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Supreme Court, U.S.
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No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM 1987

RONALD CECIL, PATRICK HADDIX, ODUS HAYES,
Petitioners,
VS.
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts committed reversible error, and violated petitioners' rights guaranteed by the Sixth Amendment, by excluding all testimony, cross-examination and argument relating to the mental condition of the government's key — indeed, sole — witness against the petitioner?

2. Whether the court below erred in affirming the trial court's ruling that a defendant must establish a *prima facie* case of a violation of the fair cross-section requirement of the Jury Selection Service Act of 1968 (28 U.S.C. Sections 1861, *et seq.*) and the Sixth Amendment to the Constitution as a prerequisite to disclosure under 28 U.S.C. Section 1867(f) of records and papers used in the jury selection process?

3. Whether substantial underrepresentation of distinctive groups on grand or petit jury venires incident to the government's reliance upon voter registration lists as its exclusive source for composing juries may constitute "systematic exclusion", thus violating the fair cross-section requirement of the Jury Selection Service Act of 1968 (28 U.S.C. Sections 1861, *et. seq.*) and the Sixth Amendment to the Constitution?

4. Whether the Court of Appeals abused its power to rehear cases *en banc* and violated petitioners' right to due process of law guaranteed by the Fifth Amendment, by *sua sponte* ordering a rehearing *en banc* (over the dissent of two members of the original panel) before the original panel's opinion — which was likely to favor appellant — had even been published, in a manner contrary to the Circuit's own Local Rules and the Federal Rules of Appellate Procedure?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those named in the caption to this petition.

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REFERENCE TO OFFICIAL REPORTS

The opinion of the Court of Appeals filed on January 11, 1988, is published at 836 F.2d 1431. A copy of that opinion is attached to this petition as Appendix A. The opinion of the United States District Court for the District of Maryland, granting the Government's motion *in limine,* was rendered from the bench and is set out in Appendix B. The pertinent portions of the District Court's order denying defendants' "Motion to Strike All Jury Lists, Including Venire of Grand Jurors, Dismiss Indictment, and for Orders Regarding Records In Connection With the Jury Selection Process" is attached as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1988. On February 5, 1988, the United States Court of Appeals for the Fourth Circuit denied the petition for rehearing. Jurisdiction of this Court is invoked under

the provisions of Section 1254 (1) of Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Amendment VI, Constitution of the United States.

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

In all criminal prosecutions, the accused shall enjoy the right . . . to a trial by an impartial jury of the state.

B. Jury Selection Service Act of 1968.

28 U.S.C. Section 1861, *et seq.* (The pertinent provisions are set out in Appendix D).

C. Federal Rules of Appellate Procedure, Rules 35, 47. (The pertinent provisions are set out in Appendix E.)

STATEMENT OF THE CASE

On November 25, 1981, an indictment was filed charging 22 named-defendants and other unindicted co-defendants with participation in a scheme to import and distribute approximately 36,000 pounds of hashish into the United States. On May 26, 1982, in a superseding indictment, defendants/petitioners Ronald Cecil, Odus Hayes, and Patrick Haddix, among others, were charged with the following offenses: (1) conspiracy to import into the United States and to possess with intent to distribute in excess of 1,000 pounds of marijuana in the form of hashish, a Schedule I non-narcotic controlled substance, in violation of 21 U.S.C. Section 952(a), 842(a)(1) and (b)(6) (Count 1); (2) importation of marijuana in the form of hashish, in violation of 21 U.S.C. Section 952(a) and aiding and abetting, in violation of 18 U.S.C. Section 2 (Counts 2, 3 and 4); and (3) possession with intent to distribute marijuana in the form of hashish, in violation of 21 U.S.C. Section 841(a)(1), and aiding and abetting, in violation of 18 U.S.C. Section 2 (Count 5). The case went to trial on March 16, 1983, before the Honorable Norman P. Ramsey, United States District Judge and a jury. On March 30,

1983, the jury found petitioners Patrick Haddix and Odus Hayes guilty on all Counts. Petitioner Ronald Cecil was found not guilty on Counts 1-4 and guilty as to Count 5.

The government's key witness against petitioner Cecil was Richard Creswell, a habitual drug user and career criminal, who agreed to plead guilty to a lesser charge in exchange for his testimony in this case. He alone testified as to petitioner Cecil's involvement in the smuggling operation.

During the course of investigations, defense counsel learned that Creswell had jumped bail in 1977 from a narcotics charge he was then facing in the Eastern District of New York. Creswell was apprehended in 1980, and returned to New York to face multiple charges. In 1981, Creswell, the government's star witness in the instant case, filed a notice, under F. R. Crim. P. 12.2, of his intention to raise an insanity defense at his upcoming trial.

In June of 1981, Creswell was examined by a reputable New Jersey psychiatrist, who concluded that the witness was legally insane, had developed "fantasies," had experienced "memory losses," and had a disorder which resulted in "the expectation of special favors in taking advantage of others."[1] Following this psychiatric examination, Creswell

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[1]The psychiatrist examined Creswell for a total of four hours. His conclusions must be accepted as true and read in the light most favorable to the defense, since they were kept from the jury. *Davis v. Alaska,* 415 U.S. 308, 317-18 (1974). The psychiatrist's report of 1981 was highly relevant to Creswell's credibility in relation to the events about which he was testifying at trial, concluding that the witness' mental condition included "vagueness of recall," and "spotty" memory losses. Indeed, defense counsel submitted an offer of proof in the form of a current certification, prepared by the psychiatrist who had examined the witness in 1981, who stated, under penalty of perjury:

> . . . It is my further opinion that the facts and conclusions set out in Exhibit A [the report] and those hereinafter stated would exist today assuming the absence of any psychiatric therapy and/or

entered into a plea agreement under which he pleaded guilty to certain specified charges.

After discovering this information in the public file, petitioner Cecil's counsel disclosed it to the government. The government then filed a written motion *in limine* to preclude cross-examination based on this episode and any material in the psychiatric report. Defense counsel made clear that several legitimate and important grounds of relevance existed for introducing the facts surrounding the psychiatric evaluation, either by way of cross-examination or a current psychiatric evaluation. First, counsel observed that if Creswell was indeed suffering from the condition diagnosed by the psychiatrist, he was incapable of telling the truth. Moreover, even if Creswell was not insane in 1981, but rather, was malingering in order to "beat the rap," the jury could reasonably find that he was now motivated to lie in order to "beat the rap" once again.

Although these pathologies were of obvious relevance to Creswell's credibility as a witness to events that had allegedly taken place in 1980, and although defense counsel committed themselves to spending a total of "no more

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> counseling by Mr. Creswell from the date of my examination to this date.
>
> It is understood that Mr. Creswell has been offered certain benefits to testify as a witness. The benefits offered would provide temptation to any man; however, conscience structure would intercede and preclude someone with a normal personality pattern from distorting the truth. A witness, from a psychiatric viewpoint, must observe clearly, remember fully, and be able to testify without suppressing or distorting the truth. Mr. Creswell's personality disorder precludes him from providing truthful testimony, in all medical probability, given the circumstances at hand.
>
> At the time of my examination, it was quite clear that he would do anything to manipulate the judicial process for purely selfish reasons.

The full text of the psychiartists report and the certification are set out in Appendix F.

than 3 minutes" on this issue, the trial judge granted the government's motion to prevent petitioner from cross-examining or presenting any evidence regarding the existence of a mental condition which prevented Creswell from telling the truth. The trial court also excluded proffered testimony from the psychiatrist who had examined Creswell, and refused defense counsel's request for a new psychiatric examination of the witness. Finally, the trial court ruled that no mention of this entire psychiatric episode could be made by the defense during the trial and closing argument.

Prior to trial, defendants/petitioners moved to strike all jury lists, including the venire of grand jurors, and to dismiss the indictment on the basis that the composition of jury lists in the District of Maryland violated the Sixth Amendment to the United States Constitution and the Jury Selection Service Act of 1968, 28 U.S.C. Section 1861, *et seq.* (hereafter "the Act"). The motion was based, in part, on a declaration from petitioner Cecil's attorney indicating that jury lists in the District of Maryland are selected only from the voter registration lists in the state of Maryland and not from any other source. The declaration further indicated that the voter registration list eliminates almost 40% of the otherwise eligible population and substantially underrepresents Blacks and persons aged 18-34. Additionally, the declaration contained assertions that supplementation of the voter registration lists with the list of Maryland residents licensed to drive would yield 90.51% representation, while only costing the state about $10,000.00 per year.

Defendants/petitioners also moved, pursuant to Section 1867 (f) of the Act, for an order granting access to papers and records used in connection with the jury selection process, in order to flesh-out the factual assertions contained in their declarations and motions. The District Court denied the motion for production of the records and papers on the ground that defendant's motion papers failed to establish a *prima facie* case of a violation of the

fair cross-section requirement of the Act and the Constitution, and that this was a prerequisite to disclosure under Section 1867 (f) of the Act. The District Court also denied on the merits the motion to dismiss the indictments, holding that defendant's moving papers conclusively demonstrated that they could not prove a *prima facie* case of a violation of the Act under *Duren v. Missouri,* 439 U.S. 357, 364 (1979).

On appeal, a divided Fourth Circuit, sitting *en banc,* upheld both rulings of the District Court, despite the government's concession that the District Court erred in denying the disclosure motion.

In addition to the substantive issues raised in this petition, an important question exists concerning the propriety of the *en banc* procedures applied by the Fourth Circuit in this case. This appeal was first argued on May 5, 1986, to a randomly selected panel of three judges from the circuit. As is obvious from listening to the tape of the oral argument, appellant "won" his case before that panel by a vote of 2-1. Dissatisfied with that result, the "dissenting" judge apparently initiated, *sua sponte,* a request for rehearing *en banc.* Appellant was given no notice of this maneuver, nor given an opportunity to contest it either on the merits or on the grounds of procedural impropriety. On January 28, 1987, before a decision was rendered, the Fourth Circuit ordered *sua sponte,* rehearing — over the dissent of two members of the original panel who were apparently prepared to rule for appellant. Additionally, two other judges on the circuit also dissented. The court, sitting *en banc* affirmed the petitioner's convictions, with three judges dissenting. A petition for rehearing was summarily denied by the Fourth Circuit, *en banc,* with four judges dissenting.

REASONS FOR GRANTING THE WRIT

I

THE LOWER COURTS COMMITTED REVERSIBLE ERROR BY EXCLUDING ALL TESTIMONY, CROSS-EXAMINATION AND ARGUMENT RELATING TO THE MENTAL CONDITION OF THE GOVERNMENT'S KEY WITNESS.

A. The Lower Courts Committed Reversible Error By Restricting the Petitioner's Right to Cross-Examine the Government's Key Witness Against Him.

As the dissent in the lower court opinion observed, "[i]t is hard to imagine evidence — other than directly exculpating evidence — more critical to a criminal defendant's defense than evidence that a key witness against him is not credible on the matters in issue because of a mental impairment affecting his powers of recall or general reliability." *United States v. Cecil,* 836 F.2d at 1456 (dissenting opinion). Petitioner contends that the trial court improperly placed limitations on defense questioning of the government's chief witness relating to his prior psychiatric condition.

The Sixth Amendment mandates that a criminal defendant has the right to be "confronted with the witnesses against him." This Court has repeatedly emphasized that "a primary interest secured by [the confrontation clause] is the right of cross-examination." *Davis v. Alaska,* 415 U.S. 308, 315 (1974), *quoting, Douglas v. Alabama,* 380 U.S. 415, 418 (1965); *Ohio v. Roberts,* 448 U.S. 56, 63 (1980). The right of cross-examination "is an essential safeguard of fact-finding accuracy in a adversary system of justice and 'the principle means by which the believability of a witness and the truth of his testimony are tested.'" *United States v. Lindstrom,* 698 F.2d 1154, 1160 (11th Cir. 1983), *quoting, Davis v. Alaska,* 415 U.S. at 316.

While the scope and extent of cross-examination are generally within the sound discretion of the trial court,

(*Davis v. Alaska,* 415 U.S. at 316) courts have noted that wide latitude should be allowed when a government witness in a criminal case is being cross-examined by the defendant. *United States v. Pedroza,* 750 F.2d 187, 195 (2d Cir. 1984). Further, the trial judge's discretion "cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony." *Gordon v. United States,* 344 U.S. 414, 423 (1953). Circuit Courts have repeatedly held that the trial court's "discretionary authority . . . comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment." *United States v. Lindstrom,* 698 F.2d at 1160, *quoting, Greene v. Wainwright,* 634 F.2d 272, 275 (5th Cir. 1981).

Moreover, where the testimony of a witness is *critical* to the government's case — where the witness is, in essence, the government's "star" witness — courts have consistently held that the defendant must be permitted even greater flexibility to attack the witness' credibility through wide-ranging cross-examination. *See, United States v. Morales-Quinones,* 812 F.2d 604, 613 (10th Cir. 1987); *United States v. Lindstrom,* 698 F.2d at 1163; *United States v. Dennis,* 625 F.2d 782, 798 (8th Cir. 1980); *United States v. Summers,* 598 F.2d 450, 460 (5th Cir. 1979). As one court recently noted, "[c]ross-examination of a government 'star' witness is important . . . and a presumption favors free cross-examination on possible bias, motive, ability to precede and remember, and general character for truthfulness." *United States v. Phelps,* 733 F.2d 1464, 1472 (11th Cir. 1984) (citations omitted).

Petitioner contends that the trial judge and the Court of Appeals, committed reversible error in preventing the jury from hearing testimony or any cross-examination about Creswell's psychiatric condition. As the Court in *United States v. Partin,* 493 F.2d 750, 762 (5th Cir. 1974) *cert. denied,* 434 U.S. 903 (1977) noted, "it is just as reasonable for the jury to be informed of a witness' mental incapacity

at a time about which he proposes to testify as it would be for the jury to know that he then suffered an impairment of sight or hearing. It all goes to the ability to comprehend, know and correctly relate the truth." *Id.* Courts have frequently noted that "the fact of insanity or mental abnormality either at the time of observing the facts which he reports in his testimony, or at the time of testifying, may be provable, on cross- examination or by extrinsic evidence." *Sinclair v. Turner,* 447 F.2d 1158, 1162 (10th Cir.), *cert. denied,* 405 U.S. 1048 (1972).

While trial judges undoubtedly have broad discretion to limit cross-examination and the introduction of evidence, where the witness is central to the government's case, courts have virtually uniformly held that restrictions on the defendant's right to present evidence concerning relevant mental instability exceed any possible trial court discretion. *See, e.g., United States v. Lindstrom, supra; Greene v. Wainright, supra; United States v. Society of Independent Gasoline Marketers,* 624 F.2d 461 (4th Cir. 1979) (criminal conviction reversed where defendant denied access to hospital records of major government witness indicating that witness had been under treatment for mental illness during alleged conspiracy) *cert. denied sub nom. Amerada Hess Corp. v. United States,* 449 U.S. 1078 (1981)[2] *United States v. Partin, supra.*

As the dissent in the court below noted, "any evidence significantly probative of this particular witness' lack of credibility was absolutely critical here." *United States v. Cecil,* 836 F.2d at 1457 (dissenting opinion). While the district court's discretion to exclude evidence pursuant to Federal Rules of Evidence, Rule 403, is wide, "with liberty at stake on the credibility of a single, indisputably crimi-

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[2]The court noted that it could "think of no more relevant or significant material than a hospital record indicating that a witness who is testifying against his former employer had been under treatment for mental illness which rendered him at that time delusional and hallucinatory with poor judgment and insight." *Id,* 624 F.2d at 469.

nal, obviously erratic and self-interested witness," *(United States v. Cecil*, 836 F.2d at 1457 (dissenting opinion), such discretion was clearly abused in the instant case by not permitting the petitioner the limited proof he sought to introduce on this critical matter. The trial judge's decision to restrict any inquiry into the government's "star" witness' well documented mental condition violated the defendant's Sixth Amendment right to confront and cross-examine witnesses.

B. The Court of Appeals Misinterpreted Precedent, and Mischaracterized the Trial Record, in Affirming the Decision of the Trial Court to Exclude all Testimony, Cross-Examination and Argument Relating to the Mental Condition of the Government's Key Witness.

The court below asserted that, in affirming the district court's decision to exclude all testimony, cross-examination and argument relating to the mental condition of the government's key witness, it was complying with the standards established by the Fourth Circuit in *United States v. Lopez*, 611 F.2d 44 (4th Cir. 1979). In *Lopez*, the court, emphasizing concern with the prejudice to the *witness*, stated that "the witness' mental impairment to constitute a proper subject for cross-examination, must have been at a time probatively related to the time period about which he was attempting to testify, must go to the witness' qualification to testify and ability to recall, and must not introduce into the case a collateral issue which would confuse the jury and which would necessitate allowing the government to introduce testimony explaining the matter." *Lopez*, 611 F.2d at 46.[3] In order to allow a trial court to determine

[3]While it is true that *Lopez* requires certain preliminary standards to be met before presenting the issue of a witness' mental impairment to the jury, the case does not stand for the proposition that under appropriate circumstances (as where the probative value of the testimony outweighs undue prejudice) this evidence should not be admitted. Rather, the standards are meant as safeguards established to avoid embarrassment and distress to a witness. The main concerns

whether such cross-examination or testimony is admissible, a party must make an offer of proof of the evidence it seeks to develop on the witness' mental impairment. *Id.*[4]

While *Lopez* announces the correct rule of law, the facts of that case are clearly distinguishable from those presented in the instant petition. In *Lopez*, the Fourth Circuit affirmed the trial judge's refusal to permit the defendant to cross-examine a witness concerning a psychiatric examination performed on him. The court, in holding that the trial court did not abuse its discretion, observed that the defendant had "pointed to nothing either in the record of the witness' psychiatric examination nor elsewhere that would show an incapacity on the witness' part to have observed the event to which his testimony related, or to recall that event sufficiently to testify accurately at trial." *Id.* at 47. Here, by contrast, the petitioner demonstrated, by the psychiatrist's certification, that the witness was shown to have incapacity which existed *during the time*

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enunciated in *Lopez* must be balanced against the need for defense counsel to pursue the defendant's constitutional right to impeach the witness. In the interests of fairness, the *Lopez* analysis must provide not only a shield for the witness, but also a sword for the defense to use for impeachment purposes. A fair reading of *Lopez* in conjunction with Federal Rules of Evidence 403 would require such a balancing of the competing interests, especially in the circumstances of this case where a conviction could not have been obtained *but for* the testimony of this critical witness.

[4]The offer of proof made by the petitioner during trial clearly satisfied the standards set out in *Lopez*. Defense counsel presented to the district judge both the psychiatric report and a certification signed by the psychiatrist who examined the witness at length. According to the psychiatrist, the witness' mental impairment existed during the spring and summer of 1980 — the time period about which Creswell testified at trial. The certification also observed that the witness' condition "would exist today [March 1983] assuming the absence of any psychiatric therapy and/or counseling." Further, the psychiatrist specifically stated that Creswell's mental impairment prevented him from testifying truthfully, and led him to "do anything to manipulate the judicial process for purely selfish reasons."

of the events about which he testified. Similarly, in *Lopez*, the defendant did not seek to introduce into the record the psychiatric examination; here, by contrast, the defendant did. Finally, and importantly, there was no indication, in *Lopez,* that the witness the defendant sought to cross-examine was critical to the government's case; here, by contrast, Creswell was the *only* government witness who testified against the petitioner. Indeed, as the dissent in the court below noted, any evidence "significantly probative of this particular witness' lack of credibility was absolutely critical here." *United States v. Cecil*, 836 F.2d at 1457 (dissenting opinion).

In affirming the decision of the lower court, the majority, in a number of critical respects, simply misread the trial record. The court, for instance, insinuates that defense counsel belatedly waited until well after the trial had begun before raising the abmissibility of the evidence which it intended to use against Creswell. *Id.* at 1458 (dissenting opinion). This assertion overlooks the undisputed material fact that it was the Government, through its efforts to prevent the evidence from coming in against Creswell, which raised the issue in its motion *in limine.* The trial court's ruling was not precipitated by a belated effort by the petitioner to get the evidence in, "but by the government to keep it out." *Id.* The critical information — that Creswell had given official notice in 1981 of his intention to enter an insanity plea and had undergone psychiatric evaluation to support his plea — was discovered by defense counsel, and communicated to the government, well in advance of the government's use of Creswell as a witness. As the dissent notes with justifiable incredulity, "[i]t defies belief, and the government does not represent, that it only became aware at mid-point of trial that Creswell might be cross-examined on the point." *Id.* There is absolutely no support in the record for the majority's insinuation that *defense* counsel was dilatory in presenting the Rule 12.2 notice to the government; on the contrary, it was the Government which kept this information from defense counsel, and which, though it must have

long known that defense counsel intended to cross-examine Creswell on this issue, waited until just before it put Creswell on the stand to raise its *in limine* motion.

Similarly in error is the majority's assertion that the trial court's exclusionary ruling was limited to two documentary items. *Id.* at 1438. By a series of rulings, the trial court excluded any and all evidence concerning Creswell's psychiatric condition and his motion in 1981. As the dissent notes, "the process of exclusion was an evolving one, over the two-day period devoted to the government's motion, but its ultimate scope and its effect was unmistakeably total exclusion," including an exclusion of all opportunity to conduct any cross-examination on the point. *See, Id.* at 1458-1460 (dissenting opinion). Similarly, the concern reflected in the majority's decision that introduction of evidence would have caused an undue delay is unsupported by the record. Indeed, defense counsel addressed this concern at trial by indicating the limited use, in both time and scope, that would be made of the evidence if it were allowed to be presented.

The majority opinion suggests that any error which may have been committed by the trial court was harmless. *See, Id.* at 1442-43. The appropriate test for harmlessness of error in the exclusion of this evidence is whether the court can say "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not swayed by the error." *Kotteakos v. United States,* 328 U.S. 750, 765 (1946).[5]

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[5] *See, also, Davis v. Alaska, supra,* in which this court wrote:

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness'] testimony which provided "a crucial link in the proof . . . of petitioner's act. . . ." The accuracy and truthfulness of the witness' testimony were key

Where, as here, the government's *entire* case against the petitioner revolved around the testimony of a *single* witness, and the trial court deprived the defendant of a critical opportunity to impeach the witness, it cannot be said with any assurance that the error was harmless. As the dissent notes, the trial court "deprived the defendant of a legitimate opportunity to impeach the sole witness against him by cross-examination on a point that might well have swayed the jury's judgment." *United States v. Cecil,* 836 U.S. at 1460 (dissenting opinion).

This Court should grant Certoriari to remedy the lower court's clear misinterpretation of precedent, and mischaracterization of the trial court record, in affirming the trial court's decision to exclude all testimony, cross-examination and argument relating to the mental condition of the government's key witness against Cecil. Petitioner had indisputable evidence, which was properly proffered to the court, that indicated that the principal — indeed, sole — government witness who testified against him had, within the past two years, asserted, officially and publicly, that during the time period about which he was testifying, he had been mentally impaired — so impaired, he had argued, that he himself should be relieved of criminal liability in a separate matter. The District Court's ruling, and the lower court's affirmance, effectively deprived petitioner of the opportunity to present any of this critically important impeachment evidence before the jury.

> elements in the state's case against petitioner . . . On these facts it seems to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which the jurors, as the sole trier of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right to effective cross-examination which " 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' "

Id. (citations omitted).

II

THE DECISION BELOW AFFIRMING THE DISTRICT COURT'S HOLDING THAT A DEFENDANT MUST ESTABLISH A *PRIMA FACIE* CASE OF A VIOLATION OF THE FAIR CROSS-SECTION REQUIREMENT OF THE ACT AND THE CONSTITUTION AS A PREREQUISITE, UNDER SECTION 1867 (f) OF THE ACT, TO DISCLOSURE OF PAPERS AND RECORDS USED IN THE JURY SELECTION PROCESS IS IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. The Decision of the Court Below is in Direct Conflict With this Court's Ruling in *Test v. United States*, 420 U.S. 28 (1975).

In *Test v. United States, supra,* at 30, this Court held that Section 1867 (f) of the Act "makes clear that a litigant [challenging jury-selection procedures] has essentially an *unqualified* right to inspect jury lists." *Id.* The Court reasoned that this "unqualified right is required under the 'plain text' of the statute, as well as 'the statute's overall purpose of insuring grand and petit juries selected at random from a fair cross-section of the community.' " *Id. quoting* 28 U.S.C. Section 1861; *See also, United States v. Alden,* 776 F.2d 771 (8th Cir. 1985); *United States v. Lawson,* 670 F.2d 923, 930 (9th Cir. 1982); *United States v. Marcano-Garcia,* 622 F.2d 12, 18 (1st Cir. 1980).

Here, the court below, in affirming the district court's denial of defendants' motion to inspect the records used in the jury-selection process, determined that the facts contained in the declaration submitted by the defendant in support of their motions were not sufficient to support the invalidation of the exclusive use of voter registration lists as a basis for evolving master jury lists. Therefore, the court concluded that defendants were not entitled to have access to the papers and records used in the jury selection process. The court based this finding, both on its assumption that the alleged underrepresentation was not a result

of "systematic exclusion," and, on its dissatisfaction with the data relied upon by defendants in support of the motion.

Despite the fact that the court's ruling directly contradicts this court's clear pronouncement in *Test v. United States, supra,* an equally startling aspect of this ruling is that the court, in a complete abandonment of judicial neutrality, argued, based on data discovered on its own and of which it took judicial notice, that the voter registration list did not impermissibly underrepresent certain groups. The court in essence found its data superior to that contained in the defendant's affidavit, and thus, upheld the district court's order denying defendant's motion.

The problem with the court's approach is twofold. First, the data it relied upon has never been subject to adversarial scrutiny. Second, the data relied upon by the court contains only voter registration lists percentages, not data showing the ultimate composition of master jury lists and venires that the Act allows defendants to discover as a basis for potential challenges. 28 U.S.C. Section 1867(f). The court, however, mistakenly assumed that the two lists will always conform to one another. More important, the court failed to recognize that the determination of whether the fair cross-section requirement has been violated is properly made by the district court upon hearing the evidence presented by the parties, not by an appellate court relying on its own unchallenged judicially noticed data.

This Court is urged to grant review to settle the direct conflict between the decision in this case and this Court's holding in *Test v. United States, supra,* which is virtually indistinguishable, in its relevant aspects, from the instant case. Further, the Court should review this case to provide guidance to lower courts and litigants faced with fair cross-section challenges pursuant to the Act.

B. The Decision of the Court Below Thwarts the Express Intent of Congress by Denying Defendants Their "Unqualified Right" to Inspect and Copy Relevant Records Pursuant to Section 1867 (f) of the Act.

The court below expressed fear that approval of defendants claim "would put in jeopardy the operation of criminal trials in this circuit . . ." because similar challenges would be made in subsequent trials causing "delay and confusion, wasting in most instances judicial time and making a mockery of orderly judicial procedure." *United States v. Cecil,* 836 U.S. at 1454-55.

Not only are these fears largely unwarranted, the court below relied on them to remove the teeth from the Act by denying petitioners/defendants the opportunity to ensure, through the procedures outlined in Section 1867 of the Act, that voter registration lists were truly providing a fair cross-section of jurors as guaranteed by the Act. Congress was well aware that voter registration lists may not always provide a fair cross-section. Therefore, they included in the Act a means for challenging the composition of master jury lists and a provision for supplementing inadequate voter registration lists. Absent a finding that the Act is unconstitutional, it is not the province of the Fourth Circuit to override Congress' express intent based on concerns of efficient judicial administration. Further, effective management of records and the principles of *stare decisis* at the district court level can quickly forestall nonmeritorius claims brought pursuant to the Act.

The decision of the Fourth Circuit is clearly out of line with the decisions of this Court and the majority of the federal circuits, and contravenes the express intent of Congress. This Court should grant review to squarely delineate the procedures mandated by the Act and to ensure that they are complied with. Moreover, the writ should issue and the case should ultimately be remanded to the district court so that petitioners/defendants may have the opportunity to flesh out and brief their assertion that sole reliance on the voter registration lists in the

District of Maryland violates the fair cross-section requirement of the Act and the Sixth Amendment to the Constitution.

III

EXCLUSIVE RELIANCE ON VOTER REGISTRATION LISTS FOR JURY SELECTION PURPOSES MAY VIOLATE THE FAIR CROSS-SECTION REQUIREMENT OF THE ACT AND THE CONSTITUTION WHEN DISTINCTIVE GROUPS ARE SUBSTANTIALLY UNDERREPRESENTED ON MASTER JURY LISTS FOR REASONS INHERENT IN THE SELECTION PROCESS.

A. The Legislative History of the Act and This Court's Decision in *Duren v. Missouri*, 439 U.S. 357 (1979) Both Indicate that Underrepresentation of Cognizable Groups Resulting from Exclusive Reliance on Voter Registration Lists May Violate the Act and the Constitution Even In the Absence of Intentional Discrimination.

The majority of the Fourth Circuit held that exclusive reliance upon voter registration lists is per se compliance with the fair cross-section requirement as long as no intentional discrimination is shown in composing either voter or jury lists. The court relied, for the most part, on a series of lower court decisions decided prior to this Court's decision in *Duren v. Missouri*, 439 U.S. 357 (1979), which held that "to establish a *prima facie* violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process." *Id.*

The critical question in this case, as evidenced by the split in the majority and dissenting opinions in the court below is whether, under *Duren,* the fair cross-section requirement only protects against intentional discrimination in the jury selection process, or, stated in other words, whether "systematic exclusion" may be found where substantial underrepresentation results from self-exclusion by members of distinctive groups when that self-exclusion is inherent in a challenged process.

The court below relied on a line of cases beginning with *Camp v. United States*, 413 F.2d 419 (5th Cir. 1969), to conclude that statutory and constitutional fair cross-section requirements are satisfied if persons belonging to cognizable groups are excluded from jury service due solely to their own inaction. This analysis fails to recognize one of two policies the Act seeks to implement — that all litigants "should have the right to grand and petit juries selected at random from a fair cross-section of the community." 28 U.S.C. Section 1861. Instead, the *Camp* line of cases is based on the other policy fostered by the Act — that "all citizens shall have the opportunity to be considered for jury service." *Id.*

While recognizing the latter policy, the *Camp* line of decisions, as well as the decision of the Fourth Circuit in this case, fail to recognize the right of a criminal defendant to be charged and tried by jurors randomly chosen from a fair cross section of the community.

This policy is evidenced in portions of the Act's legislative history which focused on the policy of securing the rights of criminal defendants to be tried by a jury chosen from a fair cross-section of the population as opposed to the public's right to serve as jurors. The legislative history notes that voting lists "need not perfectly mirror the percentage structure of the community," but:

> Any substantial percentage deviations must be corrected by the use of supplemental sources [H.R. Rep. No. 1076, at 1794.]

* * *

> Jury performance will be enhanced as well by closer approximation of the fair cross-sectional goal under the bill. It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross-sectional goal, biased juries are the result — biased in the sense that they reflect a slanted view of the community they are supposed to represent. [*Id.* at 1797.]

* * *

> [I]n accord with Section 1963 (b) (2), voter lists will be supplemented by other sources of names if they do not reflect a community cross-section. [*Id.* at 1798.]

* * *

> [M]oreover, *the bill recognizes that in some areas voter lists of all kinds may be insufficient to implement the policies of the Act, by reason of local voting practices. Where that is true, the plan must proscribe other sources to supplement the voter lists.* [*Id.* at 1799 (emphasis added).]

The legislative history of the Act demonstrates a congressional intent that underrepresentation of cognizable groups resulting from exclusive reliance on voter registration lists may violate the Act even where the underrepresentation is traceable to self-exclusion by failure of the underrepresented groups to register to vote.

Further, *Duren*, in its analysis of the Sixth Amendment fair cross-section right, supports this premise. In *Duren*, this Court dealt with the effect of underrepresentation of women on jury lists resulting from their self-exclusion under a state law exemption privilege. The court found that exclusion by this process was "systematic" and in turn violated the fair cross-section requirement. *Duren, supra*,

at 366. Thus, under *Duren*, it would appear that any process of jury selection where master jury lists and venires are produced in which "distinctive" groups are substantially underrepresented, for reasons "inherent" in the procedure used to generate the list, violates the Act and the Sixth Amendment. *Id* at 366.[6]

Additionally, as the dissent in the court below noted, *Duren* distinguishes between the equal protection rights of citizens to serve on juries and a criminal defendant's Sixth Amendment fair cross-section right. *United States v. Cecil*, 836 F.2d 1464 (dissenting opinion). The *Duren* court noted that while the equal protection right is protected against intentional discrimination, the defendant's right is violated by "systematic disproportion itself." *Duren, supra*, at 368 n. 26. The decision in *Duren*, therefore, places in question the validity of the *Camp* line of cases relied on by the Fourth Circuit.[7]

The decisions of the Federal Circuits demonstrate a conflict as to whether "systematic exclusion" can only

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[6]The court below attempts to distinguish *Duren* by noting that in *Duren*, the self-exclusion took place at the jury selection stage, rather than the voter registration stage as in this case. This distinction, however, is not useful because where the governmental process used is one in which the voter registration list is the same as the master jury list, as in this case, self-exclusion from one results in self-exclusion from the other.

[7]The court below also relied on three recent First Circuit cases in support of its decision. (*See, United States v. Lynch*, 792 F.2d 269 (1st Cir. 1986); *Amaya v. Hansen*, 781 F.2d 1 (1st Cir. 1986); *Barber v. Ponte*, 772 F.2d 982 (1st Cir. 1985) (en banc)). However, the court misinterpreted these cases as supporting its position. To the contrary, however, these cases recognize that if a group is intrinsically distinct (e.g. racial minorities), a simple showing of significant statistical underrepresentation without regard to cause, is prima facie proof that the fair cross-section requirement of the Act and Sixth Amendment has been violated. *Barber*, 772 F.2d at 998; *Amaya*, 781 F.2d at 7. This misapplication of precedent further evidences the court's confusion in interpreting the Act and the applicable case law.

result from "intentional discrimination." The *Camp* line of cases and the decision in the court below support the position that, absent intentional discrimination, underrepresentation on jury lists due to underrepresentation on voter registration lists can only be attributed to the free choice of those who have not registered. Therefore, these groups cannot be considered "cognizable" under the Act or the Constitution. *See, United States v. Evans,* 542 F.2d 805, 812 (10th Cir. 1976); *United States v. Freeman,* 514 F.2d 171, 173 (8th Cir. 1975); *United States v., Lewis,* 472 F.2d 252, 255-56 (3d Cir. 1973); *United States v. Guzman,* 468 F.2d 1245, 1248 (2d Cir. 1972); *United States v. Ross,* 468 F.2d 1213, 1216 (9th Cir. 1972).

However, a large number of other federal courts have analyzed claims of underrepresentation traceable to sole reliance on voter registration lists without according presumptive validity to exclusive reliance on voter registration lists. *See, e.g., United States v. Pepe,* 747 F.2d 632, 648-49(11th Cir. 1984); *United States v. Jenkins,* 496 F.2d 57, 64-66 (2d Cir. 1974); *Waller v. Butkovich,* 593 F.Supp. 942, 948-58 (M.D.N.C. 1984); *United States v. Armsbury,* 408 F.Supp. 1130, 1139-40 (D. Or. 1976) (expressly rejecting *Camp rationale)*; *United States v. McDaniels,* 370 F.Supp. 298, 301-12 (E.D.La. 1973) (same), *aff'd sub nom. United States v. Goff,* 509 F.2d 825 (5th Cir. 1975).

This Court should grant review to provide guidance to the lower courts interpreting the Act after *Duren* and to secure uniformity throughout the circuits. Specifically, the Court needs to make clear what constitutes "systematic exclusion" under the third prong of *Duren,* and whether sole reliance on voter registration lists will always pass muster under the Constitution absent intentional discrimination in composing either voter or jury lists. The law in regard to the Act is confused and inconsistent and is in need of an authoritative ruling by this Court.

IV

THE COURT OF APPEALS ABUSED ITS POWER TO REHEAR CASES *EN BANC*, OFFENDED THE SPIRIT OF *EN BANC* PROCEEDINGS, AND VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW BY INITIATING THE INSTANT *EN BANC* REHEARING *SUA SPONTE*, BEFORE THE ORIGINAL PANEL'S DECISION HAD EVEN BEEN RENDERED, AND IN A MANNER CONTRARY TO ITS LOCAL RULES

A. While There is a Split in the Local Rules of the Circuits as to the Propriety of *Sua Sponte* Initiation of *En Banc* Review, the Local Rules of the Fourth Circuit Do Not Provide for Judicial Initiation of *En Banc* Review.

It is well recognized that *en banc* rehearing is an exceptional procedure, appropriate only when an unusual and important issue of law is involved. Rule 35 of the Federal Rules of Appellate Procedure specifically provides that the courts of appeals should reserve these *en banc* procedures for extraordinary circumstances, directing that "[s]uch a hearing or rehearing is not favored," and should not be ordered except when "necessary to secure or maintain uniformity" of the circuit's decisions, or when "the proceeding involves a question of exceptional importance." F.R.App. P. 35(a). This Court has noted that "[e]n banc courts are the exception, not the rule." *United States v. American-Foreign Steamship Co.*, 363 U.S. 685, 689 (1960).

The power to rehear cases *en banc* — especially *sua sponte* — is subject to grave abuse. The spirit of *en banc* review is clearly violated when the reason for ordering such a rehearing is simply dissatisfaction with the alignment and makeup of the original panel — where in other words, the purpose of employing this extraordinary procedure is to engage in "judicial judge shopping" or to further

political objectives.[8] The purpose of *en banc* rehearings is not to provide a vehicle by which a member of the court, dissatisfied with the outcome of a particular case, may simply realign the votes and change the result. As Justice Jackson long ago noted, "[r]ehearings en banc are not appropriate where the effect is simply to interpose another review by an enlarged court of appeals between decision by a conventional three-judge court and petition to this Court. Delay, cost, and uncertainty, which take their toll of both the successful and unsuccessful litigant, are each increased by an additional appeal to a hybrid intermediate court." *Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U.S. 247, 273 (1953) (Jackson, J., dissenting).

Rather, as this Court has observed, *en banc* rehearings are to be "convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged to the administration and development of the law of the circuit." *United States v. American-Foreign Steamship Co.*, 363 U.S. at 689. Similarly, in *Moody v. Albermarle Paper Co.*, 417 U.S. 622, 626 (1974), this Court noted, with approval, "the wise use of this exceptional power to determine major doctrinal trends of the future for a particular circuit." *Id.*

Petitioner does not argue that the Federal Courts of Appeals are devoid of authority to initiate *en banc* hearings

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[8] *See, e.g., Arnold v. Eastern Airlines, Inc.*, 712 F.2d 899, 915 (4th Cir. 1983) (Phillips, J., dissenting) *cert. denied* 464 U.S. 1040 (1984) in which Judge Phillips of the Fourth Circuit, observed:

> [F]ormer Chief Judge Kaufman has expressed the general view that a "judge should [not] cast a vote for reconsideration by the entire court merely because he disagrees with the result reached by the Panel . . . Rule 35 was not adopted to provide that luxury." This bespeaks a general perception, with which I certainly agree, that it is not the intended function of the en banc procedure simply to provide in effect another intermediate appellate court to review for "mere" panel error.

Id., (citations omitted).

sua sponte. Indeed, in *Western Pacific R. Corp. v. Western Pacific R. Co., supra,* this Court observed, in *dicta* that such hearings were permissible. *See also,* Notes of Advisory Committee on Appellate Rules following F. R. App. P. 35 (1979). Circuits may provide, by court rule, for *sua sponte* initiation; however, "[i]t is essential, of course, that a circuit court, and the litigants who appear before it, understand the practice — whatever it may be — whereby the court convenes itself *en banc.*" *Western Pacific R. Corp. v. Western Pacific R. Co.,* 345 U.S. at 260-261. Petitioner contends that the *sua sponte* decision of the Fourth Circuit to rehear this case *en banc* constituted a clear violation of its local rules, and a gross abuse of the *en banc* procedure.

The Federal Rules of Appellate Procedure do not provide for the initiation of *en banc* hearings *sua sponte.*[9] While the "procedure to be followed by a Court of Appeals in determining whether a hearing or rehearing is to be ordered . . . is largely to be left to intramural determination by each of the Courts of Appeals," *United States v. American-Foreign S.S. Corp.,* 363 U.S. at 688 (1960), the Courts of Appeals are certainly not free to ignore those procedures once established. *Western Pacific R. Corp. v. Western Pacific R. Co.,* 345 U.S. at 260-261. The instant petition raises an important question, left open in *Western Pacific:* whether a court of appeals, in the absence of a court rule providing for *sua sponte* initiation, may order an *en banc* review without the request of a party. Judge Friendly, in *United States v. New York, New Haven & Hartford R. Co.,* 276 F.2d 525, 553, n. 1 (2nd Cir.) (Friendly, J., joined by Lumbard, J., concurring in denial of rehearing *en banc*), *cert. denied* 362 U.S. 961 (1960), expressed strong doubts as to whether the Circuit had such

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[9]As noted in the commentary following the Rule, Rule 35 *specifically* "does not effect the power of a court of appeals to initiate *en banc* hearings *sua sponte.*" Notes of Advisory Committee on Appellate Rules, Rule 35. Rule 35(B), for instance, provides only for suggestion by a *party* for hearing or rehearing *en banc.*

authority, relying, in part, on the teachings of *Western Pacific.*

Circuits are split, in their local rules, over judicial initiation of *en banc* review. The Fourth Circuit, however, in clear contravention to its conduct in the instant case, specifically does not provide for *sua sponte* initiation in its local rules. Rather, Rule 35 of the Fourth Circuit Local Rules provides only for suggestion for rehearing *en banc* by a party, requiring that the suggestion be made "at the same time, and in the same document as the petition for rehearing." 4th Cir. Local R. 35(a).

Not only are the Court of Appeals evenly split on the advisability of judicial initiation of *en banc* review, but the circuits, themselves, are internally torn as to their authority to initiate such review. In *United States v. Samuels,* 808 F.2d 1298 (8th Cir. 1987), the Eighth Circuit, which has a provision in its local rules for *sua sponte* initiation, denied a request of an active judge for a rehearing *en banc.* In a separate statement, the Chief Judge of the Circuit decried the practice of *sua sponte* rehearing. Challenging the very authority of the circuit to promulgate rules which provided for judicial requests for *en banc* review, the Chief Judge suggested that such rules might be violative of Fed. R. App. P. 47. *Id.* at 1299 (Lay, C. J., separate statement). Moreover, the Chief Judge questioned:

> . . . The propriety and advisability of a rule allowing judges *sua sponte* to seek rehearing *en banc.* We have enough work to do without assuming an activist role and becoming advocates.

Id.

Indeed, in a footnote, the Chief Judge observed that over the past twenty years, he was "not aware of any decision of the panel of this court being reheard *en banc* where only a judge has requested a rehearing *en banc* and a party has not so requested it. This historical lesson weighs heavily against the advisability of such a rule." *Id.* at 1300 n. 2.

The question of whether the Circuits may, in accordance with Fed. R. App. P. 35 and 47, provide for *sua sponte* initiation of *en banc* review is an issue of immediate concern to litigants and to the Court of Appeals — as demonstrated in *United States v. Samuels, supra,* it is an issue which divides the circuits themselves.[10] The instant case presents an even more compelling question for this Court to resolve, since the Fourth Circuit, by its local rules, does *not* provide for *sua sponte* initiation of *en banc* rehearings. Indeed, the local rules provide absolutely no procedural protection or notice to litigants regarding such conduct.

Certiorari should be granted to resolve a conflict among the Circuits as to the authority and propriety of members of the court to initiate *en banc* rehearings, particularly where, as in this case, the local rules do not provide for judicial initiation of *en banc* rehearings.

B. The Decision of the Circuit *Sua Sponte* to Rehear the Instant Matter *En Banc*, Before the Decision was even Rendered By the Original Panel, Violates the Spirit of *En Banc* Review.

En banc review is an extraordinary procedure; in the instant case, however, it was also imposed on both parties in an extraordinary manner. *En banc's* are not to be favored, "should be rarely necessary, and should be ordered only when consideration by the full court is necessary to secure or maintain uniformity of . . . decision or when the proceeding involves a question of exceptional importance." *See,* Fed. R. App. P. 35. *United States v. Samuels*, 808 F.2d at 1300 (Lay, C.J., separate statement). Where a case presents neither, *en banc* review is clearly unwarranted. *Id.* Without question, "*en banc* rehearings

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[10]In *Samuels,* the Eighth Circuit was evenly split as to the propriety of granting the judge's request for a rehearing *en banc*; the decision not to grant the request provoked four separate statements by the members of the court.

are never justified because of the makeup of the panels." *Id.*

Moreover, *sua sponte* initiation of *en banc* rehearings runs counter to the Department of Justice's clearly articulated policy of careful and considered evaluation of all *en banc* requests. The Solicitor General is entrusted with authority, under the United States Code, to argue appeals for the United States, 28 U.S.C. Sections 505, 518 (1982), and, pursuant to federal regulations, shall "(b) determine whether, and to what extent, appeals will be taken by the government to all appellate courts . . . including petitions for rehearing *en banc* . . ." 28 C.F.R. O.20, Part O — Organization of the Department of Justice, Sub-part D — Office of the Solicitor General. As an indication of the extraordinary importance which the Department attaches to governmental review of all *en banc* petitions, the Department of Justice mandates, in its United States Attorneys Manual, that "prior authorization . . . must be obtained for the filing of a suggestion for a rehearing *en banc* in a court of appeals."[11] U.S.A.M. 2-2.120(B)(1/1984). *Sua sponte* initiation of *en banc* rehearing is clearly at odds with this legitimate governmental interest in deciding which cases the government wishes to seek this extraordinary review.

A policy of *sua sponte* intitation of *en banc* rehearings, which totally ignores the interest of the parties and fails to comport with the dictates of Fed. R. App. P. 35(a), is violative of the spirit and purpose of *en banc* review. Further, where, as in this case, the issues on appeal are fact sensitive — concerning how the trial record is to be read — the decision of the court to rehear this case *en banc* evinces a policy of crass judicial judge shopping, is indicative of a procedure which is disrespectful of the role of the Solicitor General, and constitutes an abuse of the exceptional procedure of *en banc* rehearings.

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[11]Prior authorization is not required for a petition for rehearing by the same panel which heard the case. U.S.A.M. 2-2.120(B)(1/1984).

Above all, the decision of the Fourth Circuit to *sua sponte* rehear the instant appeal *en banc* gives the clear appearance of judicial impropriety — an appearance which is exacerbated by the fact that two of the judges who dissented in the *en banc* appeal were members of the original, randomly selected panel. Petitioner suggests that, contrary to the well-recognized purpose of this extraordinary procedure, the instant *en banc* opinion appears to "simply substitute . . . the judgment of a . . . majority of the . . . *en banc* court for that of a one-vote majority of a three-member panel on purely judgmental questions." *Arnold v. Eastern Airlines, Inc.*, 712 F.2d at 917 (Phillips, J., dissenting). Certainly, the conduct of the Fourth Circuit does not reflect upon a "provident use of heavily pressed judicial resources." *Id.* But more fundamentally, the instant *sua sponte* initiation of *en banc* review calls into question "the very essence of judicial neutrality." *United States v. Samuels*, 808 F.2d 1298, 1300 (Lay, C.J., separate statement). As Judge Phillips of the Fourth Circuit recently noted in dissent, the "raw power" obviously exists in the larger majority to simply substitute its judgment for every decision of a three-judge panel within the circuit; as this petition poses to this Court "the real question is the propriety of the powers exercised in this or other cases of the general type." *Arnold v. Eastern Airlines, Inc.*, 712 F.2d at 917 (Phillips, J., dissenting).

Certiorari should be granted in this case to decide whether the circuit below contravened the spirit and purpose of *en banc* rehearings, abused its power to rehear cases, and violated both its local rules and the Federal Rules of Appellate Procedure in deciding, *sua sponte,* to rehear the instant case *en banc.*

CONCLUSION

For all the foregoing reasons, petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on January 11, 1988.

DATED: March 25, 1988.

Respectfully submitted,

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Gerson S. Horn, Esq.**
William S. Pitman, Esq.
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Ronald Cecil

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** Lead Counsel

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 9665 Wilshire Blvd., Suite 450, Beverly Hills, California.

On March 25, 1988, I served the within Petition for Writ of Certiorari in re: "United States of America vs. Ronald Cecil" in the United States Supreme Court, October Term 1987, No. .....; Appendix filed under separate cover,

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California:

Clerk, United States Supreme Court
#1 First Street N.E.
Washington D.C. 20543
(40 and orig. Federal Express)

Solicitor General
Department of Justice,
Washington, D.C. 20503

Catherine C. Blake,
United States Attorney
and J. Sedwick Sollers, III
A.U.S.A., and John G. Douglass A.U.S.A
820 United States Court House
101 Lombard Street
Baltimore, MD 21201

All Parties to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on March 25, 1988, at Los Angeles, California.

_____

RITA SARNO

Subscribed and Sworn to before me this day of , 1988.

My Commission Expires _____.

_____

Notary Public

87-1599

Supreme Court, U.S.
FILED
MAR 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM 1987

RONALD CECIL, PATRICK HADDIX, ODUS HAYES,
Petitioners,
VS.
UNITED STATES OF AMERICA,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX A

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UNITED STATES of America, Appellee,
v.
Ronald CECIL, Appellant.

UNITED STATES of America, Appellee,
v.
Patrick HADDIX, Appellant.

UNITED STATES of America, Appellee,
v.
Odus HAYES, Appellant.

Nos. 83-5148, 83-5159 and 83-5191.
United States Court of Appeals,
Fourth Circuit.
Argued June 1, 1987.
Decided Jan. 11, 1988.
Rehearing and Rehearing In Banc
Denied Feb. 5, 1988.

Defendants were convicted in the United States District Court for the District of Maryland, Norman P. Ramsey, J., of conspiracy to import hashish and to possess hashish with intent to distribute, and they appealed. The Court of Appeals, Donald Russell, Circuit Judge, held that: (1) a psychiatrist's unsworn opinion about a coconspirator's credibility was not admissible to impeach the coconspirator's testimony, without presentation of the psychiatrist for a voir dire hearing on his qualifications and for cross-examination about the basis of his opinion; (2) the use of voter registration lists was permissible for jury selection, even if Hispanics were underrepresented on those lists, where there was no active discrimination; and (3) the evidence sustained one defendant's conspiracy conviction.

Affirmed.

James Dickson Phillips, Circuit Judge, concurred in part and dissented in part with opinion, in which Harrison L. Winter, Chief Judge, and Murnaghan, Circuit Judge, joined.

1. Witnesses — 327

Psychiatrist's unsworn opinion of coconspirator's "unusual" and "pathological" attachment to his dying mother was irrelevant to issue of coconspirator's ability to tell truth in prosecution of defendant for conspiracy to import hashish; coconspirator's alleged attachment to his dying mother, which allegedly caused him to jump bond, no longer existed six years after mother's death. Fed.Rules Cr.Proc.Rule 12.2, 18 U.S.C.A.; Fed.Rules Evid.Rule 705, 28 U.S.C.A.

2. Witnesses — 331½

Psychiatrist's unsworn opinion about coconspirator's alleged "narcissistic personality disorder" was not admissible to show coconspirator's alleged inability to tell truth was not admissible without voir dire hearing on psychiatrist's qualifications and without subjecting him to cross-examination about basis for his opinion. Fed.Rules Cr.Proc.Rule 12.2, 18 U.S.C.A.; Fed.Rules Evid.Rule 705, 28 U.S.C.A.

3. Witnesses — 331½

Federal evidence rule authorizing admission of expert opinion testimony did not permit admission of psychiatrist's unsworn opinion about coconspirator's ability to tell truth; issue of credibility was strictly for jury. Fed.Rules Evid.Rules 703, 705, 28 U.S.C.A.

4. Witnesses — 331½

Defendant was given ample opportunity to attack credibility and reliability of coconspirator's testimony as prosecution witness, even without admitting psychiatrist's unsworn opinion of coconspirator's ability to tell truth. Fed.Rules Cr.Proc. Rule 12.2, 18 U.S.C.A.; Fed.Rules Evid. Rule 705, 28 U.S.C.A.

5. Criminal Law — 594(1)

District court did not abuse its discretion in refusing to continue trial to permit defense counsel to call psychiatrist who had prepared unsworn opinion on coconspirator's ability to tell truth; at all times when defense counsel offered unsworn opinion, counsel assured court that psychiatrist was available to testify. Fed.Rules

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Cr.Proc.Rule 12.2, 18 U.S.C.A.; Fed.Rules Evid.Rule 705, 28 U.S.C.A.

6. Criminal Law — 627.8(3)

Defense counsel's request that district court order mental examination of coconspirator was too late where examination would have required interruption of trial. Fed.Rules Cr.Proc.Rule 12.2, 18 U.S.C.A.; Fed.Rules Evid.Rule 705, 28 U.S.C.A.

7. Jury — 33(1.1)

Constitution does not require that juror selection process be statistical mirror of community; it is sufficient that selection be in terms of fair cross section of community, gathered without active discrimination. 28 U.S.C.A. §§ 1861 et seq., 1863(b)(2); U.S.C.A. Const.Amend. 6.

8. Jury — 33(1.3)

Use of current voter registration lists as source for jury wheel from which random selection of jurors was made provided fair cross-section and did not violate Federal Jury Selection and Service Act, even if voter registration lists underrepresented Hispanics, where there was no affirmative discrimination in registration. 28 U.S.C.A. §§ 1861 et seq., 1863(b)(2); U.S.C.A. Const.Amends. 5, 6.

9. Jury — 33(1.3)

Underrepresentation of Hispanics on voter registration lists did not require supplementation of lists before lists could be used as source of jury wheel from which random selection of jurors was made. 28 U.S.C.A. §§ 1861 et seq., 1863(b)(2); U.S.C.A. Const.Amends. 5, 6.

10. Jury — 120.

Evidence of discrepancy between black and white voter registrations did not support claim that there was substantial disparity in voter registration by blacks or other groups to support claim that use of voter registration lists as source of jury wheel from which random selection of jurors was made violated fair cross section requirement. 28 U.S.C.A. §§ 1861 et seq., 1863(b)(20; U.S.C.A. Const.Amends. 5, 6.

11. Conspiracy — 47(12)

Evidence was sufficient to sustain conviction for conspiracy to possess hashish with intent to distribute in United States there was evidence that defendant participated in transferring hashish to different vessels during its transportation to United States and that defendant saw others smoking hashish on vessel.

Alan Dershowitz, Cambridge, Mass., Barbara Gold, Baltimore, Md., Robert L. Rubinstein, Miami, Fla. (Gerson S. Horn, Beverly Hills, Cal., Dirk Bruinsma, Mission Viejo, Cal., on brief), for appellants.

J. Sedwick Sollers, III, Asst. U.S. Atty. (Breckinridge L. Willcox, U.S. Atty., John G. Douglass, Asst. U.S. Atty., Baltimore, Md., on brief), for appellee.

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, CHAPMAN, WILKINSON and WILKINS, Circuit Judges, sitting en banc.

DONALD RUSSELL, Circuit Judge:

This appeal arises out of a conspiracy prosecution for the transportation by boat from Lebanon into the United States of 36,000 pounds of hashish. A large number of individuals were involved. Twenty-two of these were named in the indictment. The operation contemplated delivery of the hashish at sea off the coast of Lebanon. The conspirators had acquired a "lake" vessel to take delivery of the hashish from a couple of coast-wide ships. The vessel was to proceed across the Mediterranean Sea through the Straits of Gibraltar into the Atlantic. At some point between the coast of Portugal and the Island of Madeira, the ship, which was inadequate for an ocean crossing, would rendezvous with an ocean-going ship, to which the hashish would be delivered. The ocean-going vessel was to be met off the Maryland coast by coast-wide boats, which, after the hashish had been transferred from the ocean-going vessel, would land on shore where trucks would be available to transfer the hashish to a secluded house a short distance from the shore where the hashish would be

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stored until it could be distributed to various areas in the United States. A force had been employed and brought to the storage area to carry out the removal of the hashish from the boats and for transporting the illegal shipments to the place of temporary storage for later distribution.

From the testimony it would appear that Harold (or Otto) Hughes, a resident of California, and a person with a long involvement in drug smuggling into the United States, was in charge of certain of the shore operations in Maryland. Hughes had an assistant to whom he delegated various duties in connection with the conspiracy, Richard Creswell. Among the tasks Hughes assigned to Creswell was the leasing in his (Creswell's) name of the house where the hashish was to be unloaded and temporarily stored until it could be distributed. An apartment in another part of the area, not too far away was also leased by Creswell to be a headquarters site for the operation and for the persons engaged in the landing and distribution of the hashish.

Sometime after the hashish had been transferred from the ships to storage, and presumably had been removed for distribution about the country, Creswell was suddenly confronted by officers when he arrived in a car at the storage area. Upon request he identified himself to the officers as John Richard Campbell and presented an expired Canadian driver's license as well as a Canadian birth certificate issued him in that name. The officers remembered hearing that a "John Campbell" had been involved in charges of drug violations. When this information was verified, they arrested Creswell. Following his arrest, Creswell signed a consent waiver for the search of the house and the officers searched the house and discovered evidence that hashish had been stored there. Creswell later entered into a plea bargain agreement with the

Government under which he agreed to state truthfully his knowledge of the conspiracy. In carrying out that agreement, he gave the Government an extensive statement, in which, among other things, he named defendant Cecil as a participant in the conspiracy.

At the subsequent trial, Creswell testified as a Government witness. A number of the other conspirators had entered pleas of guilty under plea agreements as had Creswell. The three appellants herein, however, entered not guilty pleas, went to trial, and were convicted. From their convictions they have appealed.

I.

By their appeals, three questions are presented for review. Two of these have been carefully briefed and the oral arguments focused on these two issues. The first of these questions relates to an evidentiary ruling by the district judge regarding the admissibility of certain unsworn evidence relating allegedly to Creswell's credibility as a witness. Cecil sought admissibility of this evidence and, upon the denial of admissiblity, he along appeals. The second of such questions is common to all defendants, Cecil, Haddix and Hayes, and represents an attack on the constitutional validity of the use of the Maryland voters registration list as a source for the random selection of the jury panel. The third issue relates to the appeal of Hayes. He contends that the evidence was insufficient to support his conviction for conspiracy to import into the United States, and to possess with intent to distribute, hashish. We shall consider these questions separately, beginning first with the issues raised by Cecil alone.

II.

It is important in addressing the first issue to determine exactly what this issue, as pressed at trial by Cecil, was. Cecil, in his brief, has stated the issue in absolute terms: "Whether the trial court committed reversible error by excluding all testimony, cross-examination and argument relating to the mental condition of the government's key witness." He also contended that not only did the court erroneously preclude all cross-examination on this issue of Creswell's mental condition, but it also erroneously "excluded *proffered expert testimony* of the very psychiatrist who had examined Creswell" which was to be the basis-

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for such cross-examination. (Italics added) Finally, he declares that the district court erred in denying his request "for a new psychiatric examination of Creswell (Transcript of 3/28/83 at 139)." Such are Cecil's claims of error. Cecil emphasized the importance of this evidence which he claimed demonstrated the want of credibility in Creswell's testimony which, he said, was the only evidence of his involvement in the conspiracy.

It is undoubtedly true, as Cecil argues, that Creswell's testimony was important, if not critical, to sustaining Cecil's conviction. Though it might be said that there was some circumstantial evidence in the record which indicated Cecil's participation in the conspiracy, the only "live" witness who testified to Cecil's actual participation was Creswell. It was but natural under those circumstances that Cecil should make every posible attempt to discredit the credibility of Creswell as a witness, by any relevant evidence he could marshal. This was particularly important if he did not intend to offer any direct testimony attacking directly the accuracy and truthfulness of

Creswell's testimony. He accordingly attempted to undermine Creswell's testimony by introducing a record, which he said demonstrated Creswell was not a credible witness. It is the refusal to admit this specific material in evidence that constitutes the real claim of error on this first point.

Cecil did not acually raise the admissibility of this evidence until the trial had been proceeding for almost a week. Near the end of the Government's testimony and just before Creswell was to testify, Cecil's attorney advised the United States Attorney that he intended to use, during his cross-examination of Creswell, the record of a Rule 12.2 Notice,[1] along with certain supporting documents, filed by Creswell's attorney in a prosecution in the Eastern District of New York under a 1981 indictment for jumping bond given in connection with a 1977 prosecution for a violation of the Controlled Substance Act. The United States Attorney promptly requested the district judge to hold an *in limine* hearing on the admissibility of such record as a basis for cross-examination of Creswell and to dispose of the matter before Creswell testified. Without objection from Cecil, the district judge granted the motion and suspended for the moment the trial in order to hear the motion.

At the hearing, it developed that Cecil's counsel did not actually have available the record in the 1981 case in the Eastern District of New York, which he was seeking to have admitted. Counsel, however, did say that the 1981 prosecution grew out of an earlier prosecution in 1977 in the same court of Creswell for violating the Controlled Substance Act. Creswell had jumped bond in 1977 in that prosecution and had not been apprehended until early 1981. When apprehended, he was indicted in the same court for jumping bond. It was in this 1981 fugitive

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[1]Federal Rules of Criminal Procedure.

prosecution in New York that Creswell's attorney filed the Rule 12.2 Notice of an intention to assert a defense of diminished capacity and insanity which is the first item the defendant Cecil sought to have admitted in evidence. The Notice was accompanied by a supporting "tentative" statement of Dr. Seymour Kuvin, who was identified as a psychiatrist. Counsel apparently had procured this statement of Dr. Kuvin and he proceeded to publish it to the court:

> Although I cannot present any finite psychiatric opinions without a psychiatric examination of Mr. Creswell, from the information supplied, it is highly probable that Mr. Creswell exhibited a pathological personality disorder in his most unusual attachment to his mother.

After reading this statement of Dr. Kuvin, Cecil's counsel characterized the description of Creswell's stated disorder as an "Oedipus complex." Counsel, also, read a statement which he said appeared as a declaration in the Notice:

> On Wednesday, June 3, 1981, at approximately 4:00 p.m., defense counsel met with Dr. Kuvin and discussed with him his interview with Richard Creswell. At that time he orally advised counsel that, in his professional opinion, the defense of

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> diminished capacity and insanity were real defenses.

It seems obvious from this last statement that the psychiatrist had in the meantime personally interviewed Creswell but the report of such interview or interviews was not available at the time.

Cecil's counsel stated for the district judge his theory of the relevancy of this evidence. He said that his theory

had two prongs: First, the evidence would constitute proof "of the witness' disability to perceive, recall or recollect," and, second, that it would represent proof "[t]hat Mr. Creswell will do anything, including enter a plea of not guilty by reason of insanity, in order to avoid punishment, just as he did here in entering into a plea agreement." Later, in argument, Cecil's counsel, joined by other counsel in the case, elaborated somewhat on the second ground, arguing that Creswell had "utilized the not guilty plea by reason of insanity intentionally and purposefully, not believing it for one moment" and "that he is doing the same thing in this case . . ."

After observing that he was being forced to rule on the admissibility of the evidence without having available the actual record in the New York 1981 prosecution, the district judge ruled that on the showing made the evidence was irrelevant to the issue of the present competency of Creswell and would, if admitted, require the court to examine into an extraneous matter with great loss of judicial time and perhaps unnecessary prejudice to the witness and the Government's case.[2] He explained that he could not understand how a claim that Creswell was not to be held responsible for jumping bond because he "panicked" at the thought of the adverse effect that his trial and conviction would have on his mother, to whom he had an "inordinate" attachment, and who was at the moment dying of cancer, could be regarded as relevant to

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[2]In *United States v. Lopez,* 611 F.2d 44, 46 (4th Cir. 1979), we laid down as one of the limitations on use of mental impairment as a means of assailing attacks on credibility that the evidence must not "introduce into the case a collateral issue which would confuse the jury and which would necessitate allowing the Government to introduce testimony explaining the matter." *(Quoting United States v. Mucherino,* 311 F.2d 172, 174 (4th Cir. 1962)).

Creswell's action six years later when his mother had long since died. The district judge, however, added:

> I just want — I want you clear on what my ruling is before we start. If there is need to reconsider and the records come in and you want me to reconsider the ruling, I will certainly reconsider.

Thus ended the first hearing on the admissibility of this evidence.

On the next day after the first hearing, Cecil's counsel requested a rehearing of the earlier ruling, explaining that he now had received the 12.2 record from the New York Court. He produced the 12.2 Notice and the tentative opinions of the psychiatrist said to be included in the file with the Notice. This file included a report by the psychiatrist of the latter's interviews with Creswell together with a diagnosis by him of Creswell's personality based on those interviews. The report of five pages covered three interviews of Creswell by Dr. Kuvin in late May or early June, 1981. Dr. Kuvin declared that these interviews gave him an opportunity to observe fully Creswell's "verbal as well as non-verbal behavior." Dr. Kuvin observed generally in the beginning of his letter that Creswell had been "cooperative and candid throughout the entire examination." By questioning Creswell, the psychiatrist obtained and recorded an account as given by Creswell of his life history, with particular emphasis on the close relationship with his mother and his outstanding attentiveness to her during the time when she was dying with cancer. This seemed to be the primary fact observed by the psychiatrist; at least it was the only conduct of Creswell which the pschiatrist particularly noted in his report. During the interview, Dr. Kuvin said he found Creswell only to be "vague" about the events at his arrest and he seemed to accept Creswell's explanation that his vagueness was the result "of his fear that his arrest would

disturb his mother and [cause the officers] to search her house." The psychiatrist gave his opinion that this

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fear of Creswell of distress that might be inflicted on his mother was real and "inordinate." Dr. Kuvin further emphasized that whenever the conversation turned to his mother, Creswell would "become echolalic and would repeat questions in an anxious fashion rather than answer them directly." Dr. Kuvin found that Creswell's emotional problems were "predicated on faulty emotional training in early childhood. His father was a nullity emotionally. His mother was his only attachment. . . ." The psychiatrist attested to the fact that Creswell "was oriented as to time, place and person, however, and does not appear to have any gross memory deficits although he did tell of the vagueness of recall for the events surrounding the arrest. He also does have some spotty memory losses but these were not sufficient so as to suggest organic brain disease (brain tissue injury) but rather were functional in nature." He found Creswell's "[a]ssociative thought processes are, for the most part, intact." All in all, the report included no adverse comments on Creswell's credibility.

His "diagnosis" of Creswell, which followed this recitation of Creswell's background, was that he had a "narcissistic personality disorder," which he described as possessing the "criteria" of "an increased or even grandiose sense of self-importance or uniqueness with exaggeration of achievements and talents; a preoccupation with fantasies of unlimited success and power, the requirements of constant attention and admiration, either cool indifference or marked feelings of humiliation and inferiority or emptiness in response to criticism; and the expectation of special favors in taking advantage of others to indulge one's own desires and lack of empathy."

Dr. Kuvin gives no examples of Creswell's conduct or statements during the conversations which he had with Creswell that qualified under any of these criteria. Thus, the psychiatrist did not find that Creswell had been boastful; that he had exaggerated his actions; that he had made claims of any particular talents or achievements; nor that the psychiatrist reported any "fantasies" on Creswell's part. In short, he supplied no instance of any conduct or action of Creswell which fitted the criteria catalogued by the psychiatrist as a basis for that diagnosis. However, on the basis of that diagnosis, Dr. Kuvin gave this final opinion:

> This examiner is of the opinion that his behavioral pattern in terms of the events that occurred after his arrest is classical. His grandiosity superceded the rules of society. He endowed himself with unlimited powers. This, *coupled with his pathological attachment to his mother and his need to protect her in any eventuality produced the resultant leave to Santa Barbara.* The examiner is of the opinion that Mr. Creswell's actions are product of his mental illness and precluded him from conforming his conduct to the requirements of the law. (Italics added)

Cecil's counsel also presented to the court at that time a third document for admission and it is this document which Cecil wanted particularly to get into the record. It was not a part of the record from the New York Court. It had been undoubtedly prepared hastily, presumably by Cecil's counsel, and had been signed by the psychiatrist on the very day that this matter was first heard. It was styled a "Certification." In this unsworn statement Dr. Kuvin declared that "[i]t is my further opinion that the facts and conclusions set forth in Exhibit A and those hereafter stated would exist today assuming the absence of any psychiatric therapy and/or counseling by Mr.

Creswell from the date of my examination to this date [March 23, 1983]." In two later paragraphs of the "Certification, " he proceeded to set forth an opinion that, as a result of the "temptation" that the "benefits" provided by Creswell's plea bargain in this case (which the psychiatrist states he had read) coupled with his "personality disorder precludes him from providing truthful testimony, in all medical probability, given the circumstances at hand" (Paragraph 11) and that these "sufficient inducements and opportunities offered in that agreement . . . provide[d] stimulus to Mr. Creswell so that in the

[p. 1437]

face of this personality disorder, there is little likelihood of his testimonial capacity being credible." (Paragraph 14). The manifest purpose of this "Certification" was to provide first a basis for connecting the psychiatrist's opinion, as stated in his letter detailing his report on his interview of Creswell in 1981, with the opinion he gave on Creswell's credibility in the 1983 "Certification." In short, this "Certification," with its connection back to the psychiatrist's opinion in 1981, was critical to the psychiatrist's opinion that Creswell in 1983 was incapable of telling the truth, which was the specific opinion of Dr. Kuvin, which, as we have said, Cecil wished to get into the record. The United States Attorney promptly advised the district court and Cecil's counsel at this point in the hearing:

> Just so you are clear, Your Honor, on the psychiatric report from 1981, we have no objection. We do object to the certification. It is a hearsay document. That was prepared yesterday.

It is obvious that the United States Attorney made his concession because there was nothing in the 1981 report of Dr. Kuvin which would have given any credence to

Cecil's attack on Creswell's credibility as a witness in 1983 in this case. His objections went to the only statement given by Dr. Kuvin which was related to Creswell's credibility. The United States Attorney was thus, emphatic in his objection to the admissibility of the "Certification," which he characterized as unsworn hearsay, admissible, if at all, only after opportunity to the government to cross-examine Dr. Kuvin. The district judge, after this statement by the United States Attorney of his concession, addressed to Cecil's counsel: "That (referring to the "Certification") looks a little suspect. Why don't you bring him (referring to Dr. Kuvin) down?" Cecil's attorney responded that Dr. Kuvin was "under subpoena, Your Honor. He is willing to come anytime the Court wishes to beacon (?)." Cecil's counsel then explained why he wanted to introduce the "Certification" and its relevancy as he viewed it. He said that "Certification" was relevant "for the purpose of showing this man (Creswell) is very manipulative" and was capable of "doing anything to frustrate the judicial process." He also said the "Certification" raised the issue "whether this man is capable of telling the truth," saying that by this Certification the defendant Cecil had "documented the fact that a psychiatrist states that in his (Creswell's) condition he is incapable of telling the truth when offered the alternatives that the Government presented him [in the plea agreement]." The district judge somewhat incredulously inquired of the counsel if he really expected the Court to admit as evidence the "Certification." To this counsel responded: "That is what the doctor has written, and I am presenting it to the Court." He proceeded to ask that the "Certification" be marked as an exhibit. The district judge responded by ruling that the document could be marked for identification but that he was "not going to accept a certificate which is not subject to cross-examination in evidence." Counsel at this point requested that the trial

be interrupted in order that there might be a psychiatric examination of Creswell. The district judge said he would not interrupt the trial for a psychiatric examination, adding

> If you wanted this back — this has been in preparation for months and months. I am not going to stop in midstream for a psychiatric examination. If you [had] wanted one under the Rule, you should have asked for it long ago, and not in the middle of trial.

The district judge then ruled that the material which the defendant wished admitted in evidence was inadmissible. He emphasized that such notice "was never the basis for an insanity plea in New York" and observed that all of Dr. Kuvin's material represented unsworn statements, on none of which has Dr. Kuvin been cross-examined. He ruled Dr. Kuvin's "Certification" inadmissible and reiterated his ruling against the admissibility of Dr. Kuvin's letter filed in the 1981 proceedings.

The first fact to be noted in the absolute difference between what Cecil in his brief claimed to have been the erroneous ruling of the district judge and what actually the

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district judge had ruled in the hearings just discussed. As we have seen, Cecil charges that "the trial court committed reversible error by excluding all testimony, cross-examination and argument relating to the mental condition of the government's key witness [*i.e.,* Creswell]." The district judge, however, did not exclude "all testimony, cross-examination and argument" relating to Creswell's mental condition. He was never called upon to make any such ruling. What he was presented with was an attempt by Cecil's counsel to introduce into the record for use in his cross-examination of Creswell two specific

items: the first was the record of the Rule 12.2 notice filed in the New York prosecution, consisting of the notice itself, the tentative opinion (Oedipus Complex) of Dr. Kuvin and his second report of his psychiatric examination of Creswell, both of which reports were included in the file of the New York prosecution; the second was the "Certification" of Dr. Kuvin signed by Dr. Kuvin the day this issue arose some week after the trial had begun in 1983. All of these items, Cecil wished admitted, even though the qualifications of Dr. Kuvin had not been established in a *voir dire* hearing, nor had his opinion been subjected to any confrontation on cross-examination. What basically this aspect of the appeal is concerned with are these specific items and only these items submitted for admission in evidence under the circumstances stated. Cecil had, it is true, added two others, neither of which is entitled to much consideration. The district judge refused to admit as evidence the "Certification" when Dr. Kuvin who, though duly subpoenaed, failed to appear as a witness without any valid excuse. This represents Cecil's charge of error in "exclud[ing] proffered testimony of the very psychiatrist who had examined Creswell." The "proffered testimony" was not live testimony of Dr. Kuvin but his bare opinion, an expert opinion to be admitted without any proof of the expert's qualifications and without any opportunity for the Government to test the opinion on cross-examination. The district judge had repeatedly refused such opinion of Dr. Kuvin in the absence of a cross-examination of the psychiatrist. The other secondary objection is apparently the failure of the district court to interrupt the trial, after all the testimony had been taken, and the court was prepared to submit the cause to the jury, for the purpose of ordering, at Cecil's insistence, that Creswell will be subjected to a mental examination. These are all the issues that are involved in this claim of error by the district court. They are much narrower and

more precise than Cecil would state them. We shall consider each of the proffered items, beginning first with the 12.2 proceedings.

It must be recognized at the outset that the 12.2 notice and its related material were of doubtful admissibility under the Rule in any circumstances. While Creswell's counsel filed with the court in the New York prosecution the 12.2 notice along with the two statements of Dr. Kuvin, Creswell never filed a plea of diminished capacity and insanity. As a matter of fact, the notice itself was dismissed by the court as untimely and Creswell abandoned any attempt to proffer such a plea. Under those circumstances, it is arguable that subdivision (e) of Rule 12.2 which provides that the notice required under the Rule, if "later withdrawn, is not," "admissible," "in any civil or criminal proceeding," "against the person who gave notice of the intention," is applicable. As explained by the Committee Notes, this subdivision of the Rule was included to meet the test of *Williams v. Florida,* 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970) which held that "the privilege against self-incrimination is not violated by requiring the defendant to give notice of a defense where the defendant retains the 'unfettered choice' of abandoning the defense." In a subsequent clarifying amendment, the Rule was amended to make clear what had already been done in 1979 in similar language in Rule 11(e)(6), to wit, that the proscription applied to any proceeding "without regard to whether the proceeding is against that person." It is true that these amendments were adopted April 28, 1983, to be effective August 1, 1983, 89 Stat. 373, which was a short time after this trial. However, these amendments had been under discussion for a long

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time before this trial and the Report of the Rules Committee and the Recommendations of the Judicial Conference were well known before March, 1983. Moreover, the amendments had a constitutional basis which would have been as applicable before March 1983 as well as afterwards when the Rules had been amended. Under those circumstances the notice, with its additions, which was never pressed or ruled on on the merits by the New York Court and which was abandoned by Creswell, would be inadmissible.

[1] Apart from this objection to the admissibility of this evidence, it is plain that the district judge was correct in finding that this evidence was irrelevant to the issues in the 1983 prosecution, and, if admitted, would have introduced an extraneous matter that would have required a great waste of judicial time. Dr. Kuvin's report on his 1981 examination, included in the 12.2 file, dealt with the emotional condition of Creswell in 1977 when he jumped bond. A fair reading of the report demonstrated that Dr. Kuvin's opinion was that Creswell's action in jumping bond in 1977 was prompted by his "unusual" and "pathological" attachment to his dying mother and his desire to protect her from the sorrow, distress and humiliation that would have followed his trial and conviction. It was this attachment to his mother, not to any narcissistic condition, that was the only possible excuse assigned in the opinion of Dr. Kuvin for Creswell's action in 1977.

Certainly, those same considerations did not exist in 1983 when Creswell was testifying in this case. His mother had been dead for six years and there was no reason to seek to shield her from knowledge of Creswell's wrongful conduct. Beyond that, the 1983 case is entirely different than the one in which Dr. Kuvin gave his opinion in 1981 on Creswell's emotional condition. To have admit-

ted the Notice and its accompanying material would have opened up the whole question of Creswell's relationship to his mother and its effect on him emotionally, thereby injecting into this case practically a trial of Creswell's defense to the bail jumping charge.

[2] The only possible connection between the 1981 and the 1983 opinions is the "narcissistic disorder" of Creswell, according to Dr. Kuvin, which contributed equally to Creswell's action in 1977 and to his inability in 1983 to tell the truth. This constitutes, as we have said, the only possible basis for contending that the 1981 report has any relevance to Creswell's 1983 testimony. In other words, the 1981 examination is only relevant if it can be said to qualify Dr. Kuvin's 1983 opinion. Accordingly, to make out his claim of error, Cecil must establish that the diagnosis of Creswell as possessing a "narcissistic personality" demonstrated "an accepted causal link" to his inability in 1983 to tell the truth. Yet, by his description of a "narcissistic personality," Dr. Kuvin would find a person to possess such a personality if he qualifies as a self-centered braggart, exaggerating his talents and achievements, and deluding himself with his power and attainments. As we have said, it is impossible to find in Dr. Kuvin's report of 1981 a finding of the possession of any of these characteristics which Dr. Kuvin said were the "criteria" of narcissism, or to provide a "causal link" between a narcissistic personality disorder and Creswell's alleged inability to tell the truth.

Narcissism is no new term as descriptive of a person's accustomed conduct, either in literature or in psychiatry. It has been with us since the Latin poet Ovid first told the story of the youth Narcissus, who fell so in love with his own reflection in a fountain that he fell in, seeking his picture and was drowned. It came to be expressive of what the Supplement to the Oxford English Dictionary,

volume 2, p. 1129 said was "[s]elf love and admiration that found emotional satisfaction in self-contemplation," or, as the Random House Dictionary of the English Language defines as "self-love; egocentrism," p. 950. Narcissism as such is a condition that has been associated with many distinguished figures. The Oxford Dictionary quotes an author's characterization of Shelley as having a narcissistic

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personality and Coleridge spoke of engaging in narcissistic contemplation on his part. It has been used to describe a "self-centered" society. It is a term applied to the modern university student in the current best seller, *The Closing of the American Mind* by Bloom, (Random & Shuster, 1987), pp. 82 *et seq.* It was Freud who introduced the term into psychoanalytic jargon but he did so by speculating "that the detached libido is reinvested and attached to the patient's own ego" in the narcissistic personality, or, as Bloom, *supra* at 148, put it, "Freud concentrated on the id, or unconscious as the motor of the most interesting spiritual phenomena, and the related ideas of sublimation and neurosis."

It seems indisputable that the "Certification," which is the only part of this material which could have any possible relevance to the issue in this case, could not have been properly admissible without subjecting Dr. Kuvin to cross-examination in a *voir dire* hearing and even Cecil's counsel seems to have agreed on this.[3] In *United States v.*

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[3]During the March 28 hearing, Mr. Horn, Cecil's counsel told the district court:

> Your Honor, perhaps it would be best to conduct a voir dire and satisfy the Court that the foundation is proper and that this doctor can express a personal opinion and/or a psychiatric opinion in regard to this particular witness.

Gillis, 773 F.2d 549, 554 (4th Cir.1985), we said: "We have recognized the importance of developing the factual basis of psychiatric testimony regarding mental responsibility, *see, e.g. United States v. Wilson,* 399 F.2d 459, 462 (4th Cir. 1968), and have granted prosecutors wide latitude in cross-examining expert witnesses on the issue, (citing cases)." In *Wilson,* Judge Sobeloff, in dissenting, said (399 F.2d at 464):

> A psychiatrist has the obligation to present the jury with the underlying data upon which his opinion is predicated. Unsupported conclusions do not give the jury an enlightening view of the defendant's condition. The jury should be afforded a full opportunity to focus on the dynamics of defendant's mental and emotional processes and on his capacity to control his actions, rather than to be found to wrestle with esoteric psychiatric terminology.

And, Rule 705, Fed.R.Evid., clearly confers on the other party where mental capacity is raised in psychiatric testimony the right to probe into the basis for the expert's opinion. Thus, it states: "The expert [witness] may in any event be required to disclose the underlying facts or data on cross-examination." And that requirement was particularly important in this matter. The psychiatrist had diagnosed the mental difficulty of Creswell to be represented by a "narcissistic personality disorder." He identified the "criteria" that characterized such condition. Yet in his five-page report of his extensive interviews of Creswell, he never identified a single one of these "criteria" which he had observed in Creswell during his interview. The only unusual thing he observed about Creswell, as he recorded his observations, was his "inordinate" and "unusual" attachment to his mother. That was not one of the "criteria" associated with a diagnosis of a "narcissistic personality disorder." Beyond this, his opinion given in his

"Certification" that Creswell was incapable of telling the truth was based on what he said was the fact that Creswell's "narcissistic personality disorder" so weakened his conscience from what it would be in a person with a normal conscience that it was possible for the Government to seduce him with the terms of his plea bargain to such an extent that he became incapable of telling the truth. This statement is so full of unsupported and incredible assumptions that cross-examination in a *voir dire* hearing of the psychiatrist was required before this extravagant extrapolation could be accepted in evidence.[4]

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Actually, Dr. Kuvin's opinion that Creswell has a "narcissistic personality disorder" is nothing more than idle speculation without some supporting facts to sustain that opinion. Without an opportunity to cross-examine Dr. Kuvin on his opinion, his unsubstantiated bare opinions were not entitled to be admitted and the district judge correctly ruled that they were inadmissible, absent cross-examination of Dr. Kuvin. Any other ruling would have been contrary to Rule 705. What actually Cecil sought to do — and this is basically his claim here — was to have the district court admit the unsworn opinion of Dr. Kuvin, as set forth in his "Certification" without permit-

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[4]We repeat the psychiatrist's odd opinion in this regard:

> It is understood that Mr. Creswell has been offered certain benefits to testify as a witness. The benefits offered would provide temptation to any man; however, conscience structure would intercede and preclude someone with a normal personality pattern from distorting the truth. A witness, from a psychiatric viewpoint, must observe clearly, remember fully, and be able to testify without suppressing or distorting the truth. In this instance, Mr. Creswell's personality disorder precludes him from providing truthful testimony, in all medical probability, given the circumstances at hand.

ting the government any opportunity in cross-examination to probe the basis for his opinion.

[3] As a matter of fact, the opinions of Dr. Kuvin which the defendant wished to introduce without presenting Dr. Kuvin for cross-examination for the basis for his opinions, were in effect statements on the ultimate result to be reached by the jury in this case. This conclusion follows from the fact that, according to the defendant, the testimony of Creswell was the only testimony connecting him (Cecil) with the conspiracy. If this testimony was from a person who was incapable of telling the truth, then there was no evidence of guilt of Cecil in the record. Despite the breadth of those opinions of Dr. Kuvin and their lack of supporting bases, the defendant states that the opinions were admissible under Rule 704, Fed.R.Evid. What Rule 704 does is simply to authorize the trial judge to admit opinions on the ultimate fact when helpful to the trier of fact, but, as the Committee Notes make clear, it "does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. *These provisions provide ample assurances against the admission of opinions which would merely tell the jury what result to reach,* somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria." (Italics added). Moreover, Rule 703 must be construed along with Rule 705, which requires the expert "to disclose the underlying facts or data on cross-examination."

Beyond this, while the Rule permits an expert to testify on ultimate issues if the district judge finds such evidence helpful, that principle has never been extended to the right of a psychiatrist to give an opinion on the credibility of a witness. That determination of credibility is one

strictly for the jury. Many cases, decided after the adoption of the Federal Rules of Evidence, have so held. In fact, the authorities seem uniform that a psychatrist may not testify to the credibility of a witness; that issue is one for the jury. A leading precedent to this effect is *United States v. Wertis,* 505 F.2d 683, 685 (5th Cir. 1975), *cert. denied,* 422 U.S. 1045, 95 S.Ct. 2662, 45 L.Ed.2d 697 (1975): In that case, the Court said:

> Wertis' final complaint which merits brief discussion is that the court erred in refusing to permit a psychiatrist to opine whether a principal prosecution witness " . . . would . . . have a tendency to be reliable as a witness in distinguishing the truth from nontruth, realities from fantasies . . . . " Such a question as that proffered is beyond the competence of any witness. Peeled of its thin veneer of jargon, it amounts to no more than an inquiry whether the witness is to be believed by the jury or not.

The opinion in that case had already been foreshadowed by *United States v. Barnard,* 490 F.2d 907, 912-13 (9th Cir. 1973), *cert. denied,* 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974), decided before the adoption in 1975 of the Federal Rules of Evidence. There a psychiatrist and a psychologist had been called to testify on the reliability of Dillon, a co-defendant who had turned State's evidence as a witness. The two experts had read psychiatric evaluations of Dillon and his grand jury testimony and had observed some of his trial testimony.

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Both were offered by the defense as witnesses to testify that, "[o]n the basis of this familiarity," "Dillon was a sociopath who would lie when it was to his advantage to do so." The trial judge ruled such evidence inadmissible. The circuit court affirmed, saying:

> As we have seen, competency is for the judge, not the jury. Credibility, however, is for the jury — the jury is the lie detector in the courtroom. Judges frequently instruct juries about factors that the jury may or should consider in weighing the veracity of a witness. . . . It is now suggested that psychiatrists and psychologists have more of this expertise than either judges or juries, and that their opinions can be of value to both judges and juries in determining the veracity of witnesses. Perhaps. The effect of receiving such testimony, however, may be two-fold: first, it may cause juries to surrender their own common sense in weighing testimony; second, it may produce a trial within a trial on what is collateral but still an important matter. For these reasons we, like other courts that have considered the matter, are unwilling to say that when such testimony is offered, the judge must admit it.

Again, in *United States v. Awkard*, 597 F.2d 667, 671 (9th Cir.1979), *cert. denied*, 444 U.S. 885 and 969, 100 S.Ct. 179 and 460, 62 L.Ed.2d 116 and 383, the court reiterated its decision in *Barnard, supra*, adding:

> Under the Federal Rules, opinion testimony on credibility is limited to character; all other opinions on credibility are for the jurors themselves to form.

See to the same effect: United States v. Azure, 801 F.2d 336, 339-41 (8th Cir.1986); *United States v. Samara*, 643 F.2d 701, 705 (10th Cir.1981) *cert. denied*, 454 U.S. 829, 102 S.Ct. 122, 70 L.Ed.2d 104; *United States v. Provenzano*, 688 F.2d 194, 203-04 (3d Cir. 1982), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 492, 74 L.Ed.2d 634; *United States v. Jackson*, 576 F.2d 46, 49 (5th Cir.1978). For a discussion of State cases applying the same rules as

those in the Federal cases, see *State v. Lindsey*, 149 Ariz. 472, 720 P.2d 73, 75-7 (1986).[5]

Without further discussion, it seems clear that the district court did not abuse its discretion in refusing to admit into evidence the opinions and the "Certification" of Dr. Kuvin, both because the Government was denied the opportunity for a *voir dire* hearing on the qualifications of Dr. Kuvin and the opportunity to cross-examine the psychiatrist at such *voir dire* hearing as required under our opinion in *Gillis, supra*, and guaranteed under Rule 705, and because an opinion on the credibility of a witness by a psychiatrist is not allowable. Without the "Certification," all the evidence with reference to the 12.2 notice, as well as the notes attached, lose relevance on Creswell's credibility in 1983, and the district judge did not err in refusing to admit such evidence, as we so hold.

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[5]*United States v. Mest*, 789 F.2d 1069 (4th Cir.1986), *cert. denied*, ____ U.S. ____, 107 S.Ct. 163, 93 L.Ed.2d 102, is somewhat in point. There we were construing the amendment to Rule 704, Fed.R.Evid. and whether that amendment was to be applied retroactively. The amendment provides:

> (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
>
> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

We held the amendment was to be given retroactive effect. It is true the amendment applies specifically to "defendant" but the rationale of the amendment is equally applicable to one who is a "witness" such as Creswell. *See United States v. Frisbee*, 623 F.Supp. 1217, 1224 (N.D.Cal.1985).

[14] It should not be overlooked in this connection that Cecil was actually permitted to offer evidence attacking the credibility and reliability of Creswell's testimony as a witness. In order to attack Creswell's credibility Cecil sought to develop evidence, already touched on by the Government in direct examination, of the various aliases that Creswell had used in the years preceding

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his arrest in this case when he had engaged in smuggling and distributing in this country drugs and related materials over a period of some ten or more years. Using these aliases, all of which Creswell freely admitted, Creswell had on various occasions secured driver's licenses or purchased or leased trucks or cars, (falsely under oath), certifying that the alias he was then using was his true name. Similarly, he freely admitted during Cecil's counsel's cross-examination to using his alias rather than his real name in statements in courts in at least two prosecutions. He testified in that cross-examination to his use, in various amounts over a number of years, of marijuana, hashish, cocaine, LSD, peyote, psylicibin, mescaline, and amphetamines. In response to a question by Cecil's counsel, he said he knew that LSD was a psychotomimetic drug, which gave one a psychotic experience, resulting sometimes in hallucinations and delusions. He admitted at the same time that he had hallucinations sometimes after the use of LSD but never any delusions. In addition, mescaline and psylicibin were identified by him in this cross-examination as "also a hallucinogenic" drugs, producing an effect "similar to LSD but less powerful." All of this was intended to put in question whether Creswell's reliability as a witness had been diminished by his use of LSD. In fact, this was one of Cecil's most direct arguments. The circumstances surrounding the purchases of cars or trucks used in the Maryland operation were

similarly covered in the cross-examination by Cecil's counsel in an effort to check Creswell's memory and to test his power of recall by pitting his testimony against the records as to the dates when he had purchased the articles or leased the houses and the name he had used in each transaction. Counsel also examined Creswell on the precise dates when he was in court on other charges, presumably again for the purpose of showing possible inadequacies in Creswell's powers of recall and of testing the truthfulness of his testimony. There was no objection to this questioning of Creswell, all of which went to the reliability of Creswell as a witness and was for the jury to conclude whether Creswell was a credible witness in this case.

Unfortunately for Cecil's possible contention of the unreliability of Creswell's power of accurate recall, these inquiries demonstrated a remarkable ability by Creswell to recall the details of events over the years and his answers proved substantially true in all instances. In fact, after two days of testimony by Creswell, including better than a day consumed by Cecil's counsel in a searching cross-examination of Creswell, Cecil's counsel was unable to impeach in any substantial way Creswell's extensive testimony. And, the attempt at rebuttal by Cecil of Creswell's testimony was hardly more than a gesture. So far as the actual record shows, Creswell may have had an extensive involvement in drug and related operations and had used, during such time, various aliases and had never hesitated to give false information, sometimes under oath, to secure under his aliases driver's licenses and to conceal his real identity, but in all these details and in all his testimony relating to the conspiracy represented by this prosecution, Creswell's testimony met the test of complete credibility and reliability and refuted the opinion of Dr. Kuvin that Creswell was incapable of telling the truth.

[5] The remaining two points raised by the defendant Cecil may be quickly dismissed. In refusing to continue the trial in the hope that Dr. Kuvin would be present the next day the district court did not commit error. From the first hearing on the admissibility of Dr. Kuvin's written statements of his opinion on Creswell's emotional condition, Cecil's counsel had been on notice that Dr. Kuvin would have to appear to testify. Despite this warning and the district court's repeated statements that he wished to conclude the testimony on March 28, Dr. Kuvin was not presented as a witness at any time, even though Cecil's counsel had given conflicting statements on when Dr. Kuvin had been subpoenaed for appearance. Not until the testimony was concluding on March 28 did Cecil's counsel state he wanted to use Dr. Kuvin as a witness. He had to admit, however, that,

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though he said that Dr. Kuvin was subpoenaed to appear that day (March 28), Dr. Kuvin had told counsel specifically that he would not appear on March 28. Cecil's counsel said that he wanted to have Dr. Kuvin testify to the matters in his "Certification" and asked the court to admit such "Certification" because of Dr. Kuvin's unavailability at that time. After expressing grave apprehension about the admissibility of the opinion expressed by Dr. Kuvin in his "Certification" and after some animated discussions on the conflicting statements about when Dr. Kuvin had been subpoenaed to appear, the district judge denied the request. We find no error under the circumstances. Cecil had had almost a week within which to call Dr. Kuvin. So far as is shown in the record, Dr. Kuvin was not available at any time during that period.[6] Yet,

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[6]In his Reply Brief, counsel for Cecil states that he had told the district judge that Dr. Kuvin was available at any time to testify. He,

during this period, Cecil's counsel, oddly enough, was seeking to have the "Certification" admitted without presenting Dr. Kuvin, though he was continually assuring the court that Dr. Kuvin was available to testify. On the last day of testimony when the parties were checking the exhibits, Cecil's counsel brought up again that he had another witness, Dr. Kuvin. He first said Dr. Kuvin was subpoenaed for that date. Later he conceded that Dr. Kuvin had been subpoenaed to appear during the earlier part of the week. In any event, Dr. Kuvin was not present or available and it was admitted by counsel that he knew all along that he would not be present. Yet he asked again, because of the witness' unavailability, that the "Certification" be admitted. When that was refused, counsel asked that the trial be continued so that he might have Dr. Kuvin present. Naturally, the district court looked with a jaundiced eye on what had been a fairly obvious effort by Cecil's counsel to "manipulate" the district judge into admitting, without any qualification of the witness as an expert and without granting the Government any right to cross-examine the witness, that witness' opinion. We cannot fault the refusal of the district judge to admit the proffered exhibits or to continue the trial.

[6] When the district judge refused to admit the "Certification", Cecil's counsel then requested the Court to order a mental examination of Creswell. The Court had previously denied such motion, which would have required an interruption in the trial and which, as the trial judge said, came too late (made only in the midst of trial). He

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however, was not available at that time and, so far as the record shows, at no subsequent time. The seeming inference that the failure to call Dr. Kuvin was that of the district court itself overlooks the fact that the calling of witnesses is the responsibility of the party who has subpoenaed the witness, and not the responsibility of the trial court.

repeated such denial at the end of the trial and we find no error.

Accordingly, we find no merit in the defendant Cecil's claim of error in the refusal to permit the introduction into the record of the two specific evidentiary items on which the district court ruled.

III.

The defendants' attack on the jury selection procedure followed by the Maryland district courts is equally without merit. Here again it is necessary to recognize the defendants' specific objection to the jury selection procedure involved here. The defendants' attack centers entirely on the use of the current voter registration list (VRL) as the source for the jury wheel from which the random selection of jurors was made under the Maryland plan. Actually, in the affidavit of counsel submitted as the basis for the attack on the use of the VRL, counsel states that "the Plan as implemented probably does provide a cross-section of the registered voters in the State of Maryland but this is not the end of the constitutional or statutory inquiry." They contend that, if allowed access to all the jury selection process in the Maryland District Courts, they can flesh out their objections but that they have been denied access to these records. They sought by motion an order granting such access. The district judge dismissed the motion and ruled that

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the VRL was a proper source from which to select the jury venire in the District Court of Maryland. The defendants have appealed that decision and we affirm.

The use of VRLs as the source for jury selection in federal courts has been expressly sanctioned by Congress in 28 U.S.C. § 1863(b)(2). In so doing Congress obviously

recognized that such use would necessarily exclude from jury service those individuals, whatever their race, color, gender, or age, who had not registered to vote, but it determined that this use of the voter registration list or list of voters would meet the constitutional requirement of a "fair cross section" of the community, since no cognizable group would be systematically excluded. This Congressional reasoning was aptly stated by Judge Devitt in *United States v. Hanson,* 472 F.Supp. 1049, 1054 (D.Minn.1969), *aff'd*, 618 F.2d 1261 (8th Cir.1980):

> The use of voter registration lists was chosen by Congress in part because it provided each qualified citizen with an equal opportunity to cause his name to be among those from which random selection is made, and also because it was the largest generally available random source that was frequently updated. *See* H.Rep. No. 1076, 90th Cong., 2d Sess., *reprinted* in [1968] U.S.Code Cong. & Admin.News, p. 1792. The Jury Selection Act was the result of the best thoughts of each of the three branches, *see Simmons v. United States,* 406 F.2d 456, 462-63 (5th Cir.1969), and the Act was lauded and approved in dictum by the Supreme Court in the Sixth Amendment case of *Taylor v. Louisiana,* 419 U.S. 522, 528-30, 95 S.Ct. 692 [696-98], 42 L.Ed.2d 690 (1975). In light of this, to suggest, as defendants do, that the Act's use of voter registration lists violates the Constitution, simply goes too far. *Compare Hamling v. United States,* 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) (even though Act results in underrepresentation of young people, it does not violate the Sixth Amendment). Of course voter registration lists are imperfect — Indians may not vote as much as non-Indians, Hutterites may not vote as frequently as Catholics, Swedes in the Sixth Division may vote more often than Germans, young people

> may vote less than old — but this does not render use of those lists unconstitutional, especially considering the alternative, which is to set up a complicated procedure that takes into account the voting habits of all groups in the community, regardless of their size, and then supplement voter lists accordingly. No court has ever required this, and for good reason. The procedures in the Act, despite its imperfections, achieve the goal of the Sixth Amendment: through random selection from voter lists, defendants are assured of a jury pool drawn randomly from a fair cross-section of the community, and the evils of "professional jurors" and the "key man system" are eliminated. Therefore the court holds that the plan utilized in the sixth division is not inherently defective and that defendants have not established a prima facie violation of the Sixth Amendment.

The court in *United States v. Test,* 550 F.2d 577, 587, n. 10 (10th Cir.1976) made the same point:

> . . . in adopting the voter registration lists as the "preferred source" of names for prospective jurors, Congress not only intended to provide a relatively large and easily accessible source of names, but one to which all potential jurors would have equal access and which disqualified jurors solely on the basis of objective criteria.

[7] After all, the Constitution does not require that the juror selection process be a statistical mirror of the community; it is sufficient that the selection be "in terms of a 'fair cross-section' " gathered without active discrimination. This was made clear in a series of decisions in the First Circuit. In *Barber v. Ponte,* 772 F.2d 982, 997 (1st Cir.1985) (*en banc*), *cert denied,* 475 U.S. 1050, 106 S.Ct. 1272, 89 L.Ed.2d 580 (1986), that court laid down the controlling principle in this regard:

> The Supreme Court has never gone so far as to hold that the constitution requires venires to be, statistically, a

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> substantially true mirror of the community. . . . While courts often speak in terms of "fair cross section," they have realized that practical reasons, as well as the sterility of such endeavor, militate against total realization of this ideal. . . . Because a true cross section is practically unobtainable, courts have tended to allow a fair degree of leeway in designating jurors so long as the state or community does not *actively* prevent people from serving or actively discriminate, and *so long as the system is reasonably open to all.* (First italics in text; second italics added).

In this same circuit, the court, as it later emphasized in *Anaya v. Hansen,* 781 F.2d 1, 4 (1st Cir. 1986), "distinguished between deleberate exclusion of jurors and a mere showing, prima facie, of a statistical imbalance" in the VRL's, saying (772 F.2d at 1000):

> If certain people are specifically and systematically excluded from jury duty, then the jury-administrating authority would have created its own group. Clearly, the state has no right to deliberately exclude specific classes or groups from juries without some very special reason. Thus, it may not *forbid* blue collar workers, chess players, Masons, etc. from serving on juries. But if there are, as in the present case, mere statistical imbalances, unexplained, the problem is different.

Later, the same court speaking to the same point in *United States v. Lynch,* 792 F.2d 269, 271 (1st Cir. 1986), declared "that a showing of mere statistical underrepresentation, without evidence of actual discriminatory

or exclusionary practices" was insufficient to establish "a prima facie violation of the sixth amendment fair cross-section requirement," *citing Duren v. Missouri,* 439 U.S. 357, 364 (1979).

In so providing, Congress recognized that the use of VRL's, which have been compiled in a nondiscriminatory manner as the source for selection of federal juries, necessarily would exclude from jury service those individuals, whatever their color, race, or age, who had not registered to vote. But it determined that such a procedure would not violate the constitutional mandate of the sixth amendment, since no cognizable age group would be "systematically" or intentionally excluded by that procedure.

We accepted this view in *United States v. Blair,* 493 F.Supp. 398, 407 (D.Md. 1980), a decision affirmed by us in 665 F.2d 500 (4th Cir. 1980). this case, which arose in Maryland as did the case herein, involved exactly the same procedure for selecting the jury venire by reliance solely on the voter registration list as here, and this procedure was objected to on precisely the same grounds as those raised here by the defendants. The court dismissed the objections, saying:

> The use of voter registration lists has been consistently upheld against both statutory and constitutional challenge, unless the voter list in question had been compiled in a discriminatory manner. *United States v. Dellinger,* 472 F.2d 340, 366 (7th Cir. 1972); *Wilkins v. Maryland,* 402 F.Supp. 76, 78 (D.Md. 1975). Congress recognized that the use of voter registration lists in this manner would exclude from jury service those individuals who do not register to vote. However, Congress concluded that such exclusion would not be unfair since no economic or social characteristic would prevent a person from placing

his name on the voter registration list. H.R.Rep. No. 1076, 90th Cong. 2nd Sess., *reprinted in* [1968] U.S. Code Cong. & Admin. News, pp. 1792, 1794-95. Thus, the mere underrepresentation of black males on voter registration lists is not sufficient to establish a violation of the Act or of the Constitution. *United States v. Briggs,* 366 F.Supp. 1356, 1358-61 (N.D.Fla. 1973).

And we have followed this rule as stated in *Blair* in *United States v. Coats,* 611 F.2d 37, 40-41 (4th Cir. 1979), *cert. denied,* 446 U.S. 909, 100 S.Ct. 1836, 64 L.Ed.2d 261 (1980), and later in *United States v. Espinoza,* 641 F.2d 153, 168 (4th Cir. 1981), *cert. denied,* 454 U.S. 841, 102 S.Ct. 153, 70 L.Ed.2d 125. In *Coats,* we dealt with a

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challenge to the jury venire on the ground that the sole pool was the voter list at the most recent election[7] and that such a source excluded all persons who failed to vote in that election. We held that such exclusion was not violative of either the fifth and sixth amendments or the Federal Jury Selection and Service Act. Because of the alternative provision of the Federal Act, we perceive no difference between the effect of exclusion for failure to vote and exclusion for failure to register to vote in determining whether the mandate of the Constitution and Act had been met, when neither the right to vote nor the right to register had been discriminately denied any cognizable group.

In *Espinoza,* the defendant attacked the jury selection process because under the selection of the jury venire Hispanics who represented a cognizable class of persons had been excluded from the jury selection process in

[7]Section 1863(b)(2) authorizes the use of either "the voter registration lists or the lists of actual voters . . ."

violation of the defendant's rights under the sixth amendment. In denying the challenge, the court said (Page 168):

> Persons of Mexican descent may constitute such a class. *Hernandez v. Texas,* 237 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954). However, such systematic exclusion must be proven; it will not be presumed. [citing cases] The defendant must show, in order to establish a prima facie violation of the fair-cross-section requirement, "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v. Missouri, supra* 439 U.S. [357] at 364, 99 S.Ct. [664] at 668 [58 L.Ed.2d 579 (1979)].
>
> It may be true that Espinoza's trial jury included no Mexican-Americans, but as the above quoted exchanges among the court, the Assistant United States Attorney and Espinoza's counsel clearly demonstrate, the court did not, as he asserts, deny him an opportunity to establish that the absence of Mexican-Americans from that jury was the result of a deliberate policy systematically to exclude them therefrom.

These decisions of our own Circuit conform to the uniform rule adopted in other federal circuits. Judge Gewin, writing on behalf of a Committee "[p]ursuant to an assignment of the Committee on the Operation of the Jury System, said in his Report, a copy of which is included in the opinion in *Foster v. Sparks,* 506 F.2d 805, 816-17 (5th Cir.1975):

> We are aware of no case in which exclusive reliance on voter registration lists has been invalidated. In the only case where it was intimated that supplementation may have been appropriate, the court relied not upon the disproportionate representation of a particular group appearing on the list but rather upon the unlikelihood that a registration list containing only half the eligible voting age population could produce a fair cross section.
>
> The reason for judicial reluctance to treat "substantial deviation" as anything less than a constitutional deficiency is unclear. To speculate, perhaps it can be ascribed to the limited efficacy of data on both registration and voting age populations. *Disparities between the two can frequently be attributed to personal predilection not to register as opposed to state or locally imposed impediments. And courts have uniformly maintained that such predilections cannot form the basis of a cognizable class and evoke judicial sanctions against the selection system.* (Italics added)

[8] This conclusion of Judge Gewin has been supported by repeated decisions affirming that the use of the voter registra-

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tion lists as the primary Source for the selection of jury venires in federal courts is neither a constitutional nor a statutory violation. For illustrative cases to this effect, *see United States v. Afflerbach,* 754 F.2d 866, 869-70 (10th Cir.1985), *cert. denied,* 472 U.S. 1029, 105 S.Ct. 3506, 87 L.Ed.2d 636; *United States v. Warinner,* 607 F.2d 210, 214 (8th Cir.1979), *cert. denied,* 445 U.S. 927, 100 S.Ct. 1313, 63 L.Ed.2d 760 (1980); *United States v. Brady,* 579 F.2d 1121, 1134 (9th Cir.1978), *cert. denied,* 439 U.S. 1074, 99 S.Ct. 849, 59 L.Ed.2d 41 (1979); *United States v. James,*

528 F.2d 999, 1022, (5th Cir.), *rehearing denied,* 532 F.2d 1054, *cert. denied,* 429 U.S. 959, 97 S.Ct. 382, 50 L.Ed.2d 326 (1976); *United States v. Lewis,* 472 F.2d 252, 256 (3d Cir. 1973); *Camp v. United States,* 413 F.2d 419, 421 (5th Cir.), *cert. denied,* 396 U.S. 968, 90 S.Ct. 451, 24 L.Ed.2d 434 (1969); *United States v. Caci,* 401 F.2d 664, 671 (2d Cir.1968), *vacated and remanded on other grounds,* 394 U.S. 310, 89 S.Ct. 1163, 22 L.Ed.2d 297 (1969), ("It is well established that the use of voter registration lists as the source of names of prospective jurors is not unlawful because it results in the exclusion of nonvoters"); *United States v. Kelly,* 349 F.2d 720, 778 (2d Cir. 1965), *cert. denied,* 384 U.S. 947, 86 S.Ct. 1467, 16 L.Ed.2d 544 (1966), (in which the unbroken line of federal cases in this Circuit to the same effect are cited with the hope that "it will be perceived that the principles of *stare decisis* are . . . applicable" here); nor has any Circuit Court of Appeals so ruled.

Not only has the use of the voter registration lists been uniformly approved by the Court of Appeals as the basic source for the jury selection process and will not be invalidated because a group chooses not to avail itself of the right to register without any discrimination of any kind, but Congress specifically approved the use of such lists even though it was recognized that persons who chose not to register would be excluded from the jury selection process. Congress manifested this intention in the language of 1968 U.S. Code Cong. & Admin. News, 1794-95, language which Judge Harvey referred to in *Blair.* The defendants seek to weaken this clear Congressional expression of intent by pointing to other language in Section 1863(b)(2) to the effect that "any substantial percentage deviations must be corrected by the use of supplemental sources." Courts, however, have generally regarded this language to refer to "substantial percentage deviations" arising out of some discriminating prac-

tice such as that earlier pursued by the jury commissioners in *Duren* discussed later and has never been understood to refer to any underrepresentation created simply because some members of a class itself had by sloth failed to register. Actually, it is likely that Congress, writing in the midst of the civil rights legislation, was thinking of the possible vestiges of discrimination in registration to vote that might have remained in certain areas and wished to offer some safeguard against that condition by this provision for supplementation. *See* 42 U.S.C. § 1973 *et seq.* Any danger of such discrimination, however, is largely a matter of the past; in any event, it is not suggested that there was any discrimination practiced in Maryland in registration of voters at any time relevant to this prosecution and that justification for finding the voter registration lists in Maryland flawed so as to require supplementation is absent here.

The authorities cited, from practically every Circuit including our own, in many of which certiorari has consistently been denied by the Supreme Court, as well as the legislative intent expressed in the Jury Selection Act itself, as found by the courts, categorically establish that there is no violation of the jury cross-section requirement where there is merely underrepresentation of a cognizable class by reason of failure to register, when that right is fully open. This form of jury selection (*i.e.*, by the use of VRLs) cannot be described "as 'systematically' excluding classes that do not register in proportion to their numbers"; it is a process that comports with the "need for efficient jury selection" even through it may not "perfectly reflect population." Nor does it follow that the voter registration lists do not satisfy the fair cross-section of

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the population simply because group members of one group neglected to register in the same proportion as was their share in the overall population. The Constitution and the statute do not require such perfection. It is sufficient that the system adopted provides a fair cross-section and we find both common sense and precedent establish that if the voter registration lists do this they are not tainted by some affirmative form of discrimination.

It must be remembered that the Maryland plan which prescribes the use of the voter registration list has been approved in the manner required by the statute by the chief judge and the other district judges of Maryland and by the Judicial Council of this Circuit, 28 U.S.C. § 1863(a); and that plan recites affirmatively the combined judgment of both the district court and of this court that "voter registration lists represent a fair cross-section of the community in the District of Maryland."[8] This is no perfunctory statement of judgment; it is the considered judgment of an impartial group with intimate acquaintance with the population involved and with the constitutional and statutory requirements. In *Waller v. Butkovich*, 593 F.Supp. 942, 958 (M.D.N.C.1984), Judge Merhige, sitting by designation, said in connection with such an approval of a jury selection plan that "[w]hile this [approval] . . . is not dispositive, it does suggest that a court should at least have 'some sense of conviction' before declaring that a district's jury selection plan has substantially failed to comply with the fair cross-section require-

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[8]Were it not that the appellants have included this conclusion in their affidavit presented to the court we could properly take judicial notice of this finding by the courts. *United States v. Hawkins*, 566 F.2d 1006, 1008, n. 2 (5th Cir.), *cert. denied*, 439 U.S. 848, 99 S.Ct. 150, 58 L.Ed. 2d 151 (1978).

ment." *See also United States v. Hanson,* 618 F.2d 1261, 1267 (8th Cir.1980). We agree with that view.

[9] The defendants, however, posit that lack of fair representation of any "distinctive" or identifiable class of group on the voter registration list used for jury selection renders the list inadequate, requiring supplementation. They would find warrant for this contention in *Duren v. Missouri,* 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), which relied substantially on the earlier decision of *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). We do not deduce any such rule from the decision in either *Duren* or *Taylor.* In fact, we find nothing in either of those decisions which would open to doubt our decisions in *Blair, Coats,* and *Espinoza* or the decisions to like effect from other circuits. And we think a review of those two cases will sustain that view. In support of that view, we look to the decision in those two cases.

Taylor will not long delay us. In that case, women were only included in the jury selection process if they expressly requested to be included; no similar requirement existed in the case of male registrants. No provision for notice to women of this necessity to request inclusion in order to be included in the jury lists was given. The result was the effective exclusion of most women by this method of affirmative discrimination against them in the jury selection process. That procedure is not analogous in any way to the use of the voter registration list where registration is open to all without discrimination of any kind as to sex, race, or color. Actually, as Judge Devitt observed in *Hanson,* the Supreme Court in *Taylor* spoke approvingly of and impliedly counseled the use of the VRLs as the primary source for providing fair representation cross- section for the jury selection process. 419 U.S. at 538, 95 S.Ct. at 701. *Taylor* accordingly offers no support

for an argument impugning the propriety of the sole use of the voter registration lists as the primary source for jury selection.

Duren is equally not in point. There is not one word of criticism of the use of the voter registration lists in the opinion in that case. If fact, the Court expressly stated it found nothing objectionable in the use of the voter registration lists as the sole source for ascertaining the initial group from which the jury venire would be

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drawn. The Court knew that the lists did not include members of any class who had not registered to vote, and it no doubt knew as well as the writer of the Census monograph, quoted by the appellants in their motion, the percentage of women on the voter registration lists. Despite this, the Court said: "There was no indication that underrepresentation of women occurred at the first stage of the selection process — the questionnarie canvass of persons randomly selected from the relevant voter registration list." 439 U.S. at 366, 99 S.Ct. at 669. The court proceeded to add that the "first sign of a *systematic* discrepancy [as noted by the Court in this case] is at the next stage — the construction of the jury wheel from which persons are randomly summoned for service." (Italics added). At this "stage," women whose names had been drawn from the list were given "another opportunity to claim exemption," and — this is the important point — the jury commissioner presumed the failure of a woman to claim an exemption to be a claim for exemption and the names of those women who failed to register were removed from the list. No similar rule applied to male registrants. As a result of this discriminatory action on the part of the jury commissioner, the record demonstrated that there was created a large disparity in the representation of women on the actual jury venire, which

"occurred not just occassionally, but in every weekly venire for a period of nearly a year," thereby indicating "that the cause of the underrepresentation was systematic — that is, inherent in the particular jury-selection process utilized." 439 U.S. at 366, 99 S.Ct. at 669. We repeat: It was not the use of the voter registration list as the sole source for the threshold ascertainment of the group from which the jury venire was to be selected that was faulted; it was the use by the jury commissioners of an impermissible presumption to exclude a large number of women at the next step in the preparation of the jury wheel that prompted the Court's disapproval. There is then nothing in the *Duren* decision that could be said to deal with the question whether the voter registration lists may require supplementation merely because of the failure of the lists to include sufficiently the names of those in the appropriate age or racial group who had failed to register, and we regard any effort to read such a ruling in the decision error.[9]

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[9]This construction of the decisions in *Taylor* and *Duren* is similar to that stated in the Note on the Missouri decision in *Duren* in 47 UMKC L.Rev. 246, 254 (1978):

> Under the Missouri court's decision in *State v. Duren*, the female exemption system held unconstitutional in *Taylor v. Louisiana* was substantially different than the system utilized in Missouri. Under the Louisiana system, a woman was required to "opt on"; the court would not add her name to the jury wheel until she had filed a written declaration indicating her desire to serve. Under the Missouri system, women may "opt off." There is no difference between the questionnaires sent to prospective male and female jurors. The difference lies in the fact that women are clearly notified by the questionnaires that they may, for no cause and at their option, decline to serve at any time before being sworn onto the jury and that men are not given this option. The Missouri court concluded that because Louisiana women had to volunteer before they were put on the jury list, this resulted in the effective exclusion of females. If a woman in Jackson County does not return her questionnaire, her name is automatically added to the

As a matter of fact, we do not understand the defendants to suggest that there is any explicit language in any Supreme Court decision that declares that the voter registration lists may be declared invalid as the primary source in the jury selection process because members of one cognizable class have failed to register in the same proportion as other cognizable classes. In effect, the defendants would deduce that such rule is "*clear*" because they say in *Duren* the Supreme Court found there to

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have been affirmative discrimination in the *subsequent* use by the jury commissioners of the voter registration list in the sequential development of the jury venire through the development of a presumption which prejudiced the selection of women appearing on the voting list. The ruling in *Duren* does not make "clear" the rule the defendants would deduce from it. And in this conclusion, we find confirmation in the ruling made by Chief Justice (then Justice) Rehnquist, sitting as a single Justice, on a motion to stay in *California v. Harris,* 468 U.S. 1303, 105 S.Ct. 1, 82 L.Ed.2d 807 (1984). In *Harris,* it was argued in favor of the motion to stay that the opinion sought to be stayed had held that it is "a violation of the jury cross-section requirement where there is merely under-representation of a cognizable class because of the failure of class members to register to vote." Chief Justice

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jury wheel. However, if that woman's name should be drawn from the wheel and she still does not respond to her summons to jury duty, the commissioner will presume that she has exercised her option not to serve. The end result of the Missouri system, therefore, is the same as that under the Louisiana system. Women in either system, unlike men, are required to take some affirmative action — either mailing in a request to be added to the list, as in Louisiana, or mailing in a questionnaire and/or summons, as in Missouri — before they can be selected for jury service.

Rehnquist did not construe the decision of the State Court to hold, as argued by the movant, and denied the motion for a stay. But he added after reaching that conclusion, lest there be any misunderstanding of his decision — and this is the important language so far as we are here concerned — that had he thought the State Court had so held, he would have "grant[ed] a stay, because I think four Members of our Court would probably vote to grant certiorari to review the issue," explaining

> Whether this sort of jury selection procedure can be described as *"systematically"* excluding classes that do not register to vote in proportion to their numbers, and whether the need for efficient jury selection may not justify resort to such neutral lists as voter registration rolls even though they do not perfectly reflect population, *see* 439 U.S. at 368-370 [99 S.Ct. at 670-72], are by no means open and shut questions under *Duren*. (Italics added).

We take it to be "clear" from this statement of Chief Justice Rehnquist that neither *Duren* nor *Taylor* — or, for that matter, any other decision of the Supreme Court — supports the view espoused by the defendants that a jury selection process which uses as its primary source solely a voter registration list, which has underrepresentation of a cognizable class arising from the failure of its members to register to vote in sufficient numbers but not because of any "systematic" exclusion of such a group, will not satisfy the constitutional and statutory jury cross-section requirements. Further, *Duren* has not been construed by other courts of appeals as establishing any such rule as that urged by the defendants.

In summary, as a matter of law, the construction of the defendants of Section 1863 and the constitutional mandate in this matter is contrary to established precedent

and the challenge of the defendants to the use of the voter registration list in this case, because members of a cognizable class were not adequately represented in the jury selection by reason of the failure of members of that class to register, should be dismissed as a matter of law. Even were it to be considered that a substantial underrepresentation of a cognizable group on the voter registration lists because of the failure of members of such group to register may be a ground for requiring supplementation of such list — a conclusion which flies in the face of all precedent and violates Congressional intent — the appellants have not made a proper showing of such underrepresentation to support a showing of that character. As the Court said in *United States v. Bennett,* 539 F.2d 45, 55 (10th Cir.1976), *cert. denied,* 429 U.S. 925, 97 S.Ct. 327, 50 L.Ed.2d 293, "the supplementation of voter lists is the exception, not the rule, and absent a showing of deficient representation the use of an approved jury selection process is lawful"[10] And to make such a showing the challenger of the selection process must by affidavit set forth "a sworn statement of facts

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which, if true, would constitute a substantial failure to comply with the provisions" of the Jury Selection Act. 28 U.S.C. § 1867(d); *In Re Shriner,* 735 F.2d 1236, 1241 (11th Cir. 1984); *United States v. Goodlow,* 597 F.2d 159, 162 (9th Cir.), *cert. denied,* 442 U.S. 913, 99 S.Ct. 2830, 61 L.Ed.2d 280 (1979); *United States v. Smaldone,* 485 F.2d 1333, 1346- 47 (10th Cir. 1973), *cert. denied,* 416 U.S. 936,

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[10] *See also United States v. Hanson, supra,* 618 F.2d at 1267, quoting from *United States v. Freeman,* 514 F.2d 171 (8th Cir.1975):

> the voting lists must be supplemented to obtain jurors from a fair cross section of the community only "where obstacles are placed in the paths of certain citizens attempting to register to vote."

94 S.Ct. 1934, 40 L.Ed.2d 286 (1974). The facts stated in the affidavit in this case, such as they are, are not sufficient on their face to support an invalidation of the sole use of such lists. At the outset it should be noted that the statement of facts in the affidavit is by and large on information and belief and, in many instances, is couched in conclusory language. The source for such allegations of fact as there are in the affidavit is identified as official census figures or studies of such official census reports or of the voter selection plan under challenge itself. It justified this reliance on census figures and calculations on the correct contention that courts may take judicial notice of official governmental reports and statistics. Fed.R.Evid. 902(5); Louisell and Mueller, *Federal Evidence* § 533. The review of the affidavit must be made with these facts in mind.

[10] Mr. Horn's affidavit begins with the allegation on information and belief that the grand jury which indicted the appellants and the petit jury to be impaneled were to be selected "from only the voter registration lists of the State of Maryland ('VRL') and not from any other source."[11] The affidavit then details the procedure followed in selecting grand and petit jurors from this single source (VRLs) under the Maryland plan. He concedes, as he states in his affidavit, that *"based on what I have learned I think that the implementation of the Plan does provide 'randomness' relative to the VRL. In other words, the Plan as implemented probably does provide a cross-section of the registered voters in the State of Maryland but*

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[11]The so-called affidavit of Mr. Horn, is to say the least, unusual. It was not executed by Mr. Horn; it was executed by an attorney who worked for Mr. Horn, Robert Lloyd Rubinstein. In explaining why he and not Mr. Horn executed the affidavit, Mr. Rubinstein said: "Mr. Horn is not in Los Angeles at this moment and I have read the foregoing, know its contents, and make the identical declaration."

this is not the end of the constitutional or statutory inquiry." The affidavit follows with the claim that the VRL in question includes but 60% of the State's population 18 years of age and older entitled to vote. With specific reference to blacks in Maryland, it states that 20.82% of the total Maryland residents are blacks 18 years or older and that "based on census information and studies, black Maryland residents will be substantially underrepresented on the VRL" and their underrepresentation will be due to their "systematic exclusion in the jury selection process (systematic in that it is inherent in exclusive reliance on the VRL, at least in a state with a large black community such as Maryland)." The same charge of underrepresentation is made in the affidavit in connection with persons ages 18 to 34 and the same claim of "systematic exclusion" as that stated for black residents. The studies and census information on which the affiant predicates his claim of "systematic exclusion" is apparently a Bureau of the Census monograph issued in 1973 which includes this statement quoted in the affidavit:

> Higher levels of registration and voting were associated with persons who were male, white, those in the middle-age group (35-64), those persons with at least a high school diploma, those in families with incomes greater than $10,000, and those in white-collar occupations. Conversely, females, negroes, persons of Spanish ethnic origin, the youngest (18-34) and oldest age groups (65 and older), those who did not complete elementary school education, those in families with incomes less than $5,000 and those in unskilled occupations, such as laborers and private household workers, were less likely to be registered and vote.

It is odd that the affiant has based his affidavit setting forth these figures on census reports for the years prior to the 1980s. The appellants were tried in 1983 and there

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is a census report for 1983 showing registration to vote as of November 1982. This case is not to be decided on a Report dealing with 1980 voter registration lists but on the use of the 1982 voter registration list in the preparation of the jury pool.[12] The 1982 Census Report on Maryland's voter registration list is in our opinion the proper Report to consider in this connection. This Report shows that in the election in November 1982, the percentage of those of voting age who had registered to vote in

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[12]The fallacy in relying on 1970 voter registration and voting lists is well illustrated in certain census figures released by the Census Bureau on October 6, 1987, as summarized in *The Washington Post* p. A3, October 7, 1987:

> According to the Census Bureau survey, young blacks, defined as those ages 18 to 24, trailed their white counterparts in voter turnout by about 10 percentage points until 1978, but their participation rose from 20 percent that year to 25 percent in 1982 and 1986. At the same time, turnout of young whites dropped from 24 percent in 1978 to 22 percent last November, the survey said.
>
> Meanwhile, the gap between overall turnout of black voters and white voters was the smallest ever recorded — 3.8 percent, compared to a 10-point difference in 1980. The turnout was 47 percent among whites, 43.2 percent among blacks.
>
> "It's important because it tells you how much the country is changing," Garin said. "Black turnout used to be so much lower that there was a discount factor in assessing its impact. Nobody can discount it anymore."

It is obvious from this Census Report that there is no basis in fact for any assumption that voter registration or voter registration lists are disproportionately slanted against blacks generally or black youths in the 18-24 year group specially in the 1980s, as contended by the defendants.

Maryland was 65.7%. This compares favorably with the national average of 65.6%. The percentage of all registered, divided between white and black registrants, was 67.5% white and 61.4% black registrants. A comparison of black registrants in Maryland with that nationally is similarly favorable to Maryland. In Maryland the percentage of blacks registering to vote was 61.4% of the available population, whle the percentage of blacks so registering nationally was 59.1%. Significantly, the percentage difference between black and white registrants was the same for both Maryland and for the nation as a whole. If we go further to review other information in the Census Report, we perceive no clear pattern nationally of substantial underrepresentation of blacks in voter registration. Thus, in Louisiana, blacks had registered in greater proportions than whites. In New York, however, the proportion of blacks who had registered to vote was 45.2% and of whites 59.5%, or a difference of 14% roughly. In South Carolina, on the other hand, the difference in registration between the two is barely over 1%. In Missouri, California, Wisconsin and Illinois, blacks are registered to vote in greater proportion than whites.

We have detailed at some length these figures because they disprove entirely the appellants' claim that the discrepancy between black and white registrants to vote in Maryland give any support whatever for the appellants' claim that there is such substantial disparity in voter registration by blacks as to show gross underrepresentation of that group in the Maryland registration lists. And it is substantial underrepresentation which must be shown. Neither the statute nor the decisions provides any particular formula for determining whether there is a substantial discrepancy or not. Judge Gewin states that the United States Commission on Civil Rights proposed that "any disparity of 20% or more between the proportion of eligible whites selected for master jury wheel and

proportion of eligible minority persons selected be remedied by supplementation." 506 F.2d at 818. Under this test the voter registration list in this case would not require supplementation since the number of black registrants substantially exceeded the 80% test. The result would be similar under any test identified in Judge Gewin's remark or any test discussed by Judge Harvey in *Blair,* at 408. It is clear, then, on its face, the appellants' showing does not indicate "substantial" underrepresentation of blacks on the Maryland voter registration lists.

The appellants proceed to advance the argument that there are more registered automobile drivers in Maryland than there

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are registered voters and that such lists should be blended with those of voter registration on some basis to achieve an acceptable corss-section representation in the jury selection process. The important point in this regard is that the appellants nowhere suggest that blacks are disproportionately represented as between whites and blacks, measured by their representation in the overall population, on the driver-licensed list. It seems fair for us to assume that whites are overrepresented on such driver registration list. In any event, there is no assurance that blacks will be represented more proportionately on those lists than on the voter registration lists. We question that the appellants' proposal is superior in fairness to the procedure recommended by Congress and approved by this court itself for the district courts of Maryland. Judge Gewin has said in this connection, the hearing on the Jury Selection Act established that of all suggested sources for the selection of the jury wheel none was "free from all difficulty" and did not have "substantial shortcomings" "except for voter registration lists." 506 F.2d at 818, n.2. In any event, there is no justification for looking to the

driver registration lists rather than to the voter registration lists, and attempting to find what Congress, in its consideration of the Voter Selection Act, did was inadequate.

Indeed, this very suggestion of the appellants for the use of driver registration lists demonstrates the confusion and administrative nightmare that will result from following the argument of the defendants. Unquestionably, if defendants prevail, criminal defendants will present the trial courts with all kinds of imaginary new methods of substituting this or that list for the voter registration list, always arguing that their list is superior to the voter registration list. Furthermore, the Census Report which the appellants cite identifies a substantial number of additional "cognizable classes" which it states were in *the late 60's* underrepresented on the voter registration lists because members of such class had neglected to vote. These and many groups other than those named in this Report could be probably named. To determine whether such classes were so underrepresented would be a formidable undertaking. Moreover, such challenges would make for interminable delays in trials and great waste of judicial time. This was the very kind of administrative inefficiency that Chief Justice Rehnquist adverted to in his *Harris* opinion.

We cannot conclude without expressing our anxiety over the disturbing, almost devastating, effect approval of defendants' claim in this regard would have on the orderly and efficient conduct of criminal trials and the excessive burden it would place on the trial courts in this Circuit. We are reasonably confident that every jury plan in this Circuit, as well as those in most of the other Circuits, provides for the use of voter registration lists in the jury selection process. All these plans have been approved, as satisfying the fair cross-section requirement

of the statute and the Constitution. We are equally confident that the same disparity that the defendants purport to find in this case will, therefore, exist throughout the Circuit and every future prosecution in this Circuit will be open to the same challenge as that raised here. Moreover, if underrepresentation of a cognizable class could be found in various classes identified in the Census monograph quoted in Mr. Horn's affidavit, ("females, negroes, persons of Spanish ethnic origin, the youngest (18-34) and oldest age groups (65 or older) because they had failed to register, those who did not complete elementary school education, those in families with incomes less than $5,000 and those in unskilled occupations, such as laborers and private household workers"),[13] the opportunities for a criminal defendant to stymie the orderly jury selection process could render the efficient administration of criminal trials in this Circuit difficult beyond measure. To sustain the defendants on this point would put in jeopardy the operation

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of criminal trials in this Circuit with disastrous effect on the enforcement of the criminal laws.

The jury selection process has already become in many instances a nightmare of delays and confusion for the courts. Jury selection, mired down with all sorts of objections, has on occasion taken on a more important part in the proceedings than the guilt or innocence of the defendant. Not infrequently the selection process consumes far more time of the court than the actual trial of

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[13]Unquestionably, the ingenuity of counsel will conjure up any number of other alleged "cognizable" groups entitled to fair representation. It should not be anticipated that the challenges to the jury system would be confined to claims only by the groups listed in the Census Report.

the case on the merits. The contention of the defendants if upheld could introduce into the jury selection process another new instrument for obstruction, delay and confusion, wasting in most instances judicial time and making a mockery of orderly judicial procedure.

For reasons given, we conclude both as a matter of law and on the facts (such as they are) in the affidavit, the challenge to the jury selection process in this case is without merit. The voter registration list used in this case complied both as a matter of law and on the undisputed record with the fair representation requirement for jury selection. Since this fact is indisputably established by established governmental reports and statistics and there was no need for the district court to have engaged in a fruitless examination of the Maryland jury procedure followed in federal courts of that state, and any claim by the defendants of a need for such an inquiry is a manifestly dilatory tactic to harass the trial court with a useless inquiry and to delay trial, we have no hesitancy in affirming the dismissal of this motion of the defendants.

It follows that the challenge of the defendants to the jury selection process in this case is without any merit.

IV.

[11] The defendant Hayes questions the sufficiency of the evidence convicting him under count one charging conspiracy to possess hashish with intent to distribute in the United States. We agree with the district court that the evidence was sufficient. Hayes was a member of a five-man all-American crew, recruited and brought at considerable expense to Cyprus for the purpose of outfitting a river and lake boat to take cargo off the coast of Lebanon across the Mediterranean Sea through the Straits of Gibraltar into the Atlantic where it was to rendezvous with an ocean- going vessel somewhere off the coast of

Portugal and near the Island of Madeira. As a preliminary to the trip, the name of the boat and its registration were changed. Also, extensive repairs were made to the boat after it sailed from Cyprus to Piraeus in Greece. When finally repaired, the ship headed to a point about 15 to 18 miles from Beirut, Lebanon. There the boat was met by two smaller boats which brought from Lebanon 18 tons of hashish. Hayes participated in transferring this hashish from the small boats to the boat of which he was a member of the crew. After taking on the hashish, the boat with Hayes and one of its small crews proceeded across the Mediterranean Sea through the Straits of Gibraltar into the Atlantic Ocean. This trip involved some weeks. During this time, the crew pilfered some of the hashish and smoked it constantly on the voyage. There is no direct evidence that Hayes himself smoked any hashish on the trip but it is obvious he saw the others smoking the hashish. Further, there is no evidence that Hayes actually discussed the cargo and its destination with others on the voyage but it is inconceivable that the crew, including Hayes, did not talk and know the purpose of the trip or the cargo they were transporting.

When the boat on which Hayes was a member of the crew had rendezvoused with the ship from the United States in the Atlantic, Hayes assisted in transferring the hashish to the ocean-going vessel. The transfer was made because the boat on which Hayes served was not capable of crossing the ocean and the other ship had been brought over from Maryland to make the crossing. Hayes manifestly knew this. All the crew in the ocean-going ship were Americans. Obviously the ship had come from the United States and it was heading back to the west. Hayes and everyone involved had to have known that the whole operation was one beyond the law. Other-

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wise, the first ship would not have avoided taking on its cargo in port in the normal way but had taken on its cargo at sea clandestinely under circumstances where its movements would not be observed. The transfer at sea from the first ship to the second ship of what Hayes and those with him knew was hashish more than justified the inference that Hayes knew that the hashish was going to be smuggled into some place in the west. The ocean-going vessel came from the United States and it was reasonable to assume that the boat was returning there with its crew. Certainly, the clandestine, byzantine nature of the whole transaction, conducted and heavily financed by Americans, all pointed towards the conclusion that the object of the whole operation was to smuggle hashish into the United States and Hayes' participation in the operation was a part of the smuggling.

We find the evidence more than sufficient to sustain Hayes' conviction.

SUMMARY

In summary, we find, first, no error in the district judge's ruling refusing to admit in evidence the opinions and "Certification" of Dr. Seymour Kuvin as a foundation for cross-examination of Creswell, as well as the 12.2 Notice filed by Creswell's counsel in a case in the Eastern District of New York. Neither do we find any error in the district court's refusal to continue the case in order to provide a further opportunity for Dr. Kuvin to appear and be examined or to order at the end of the trial a psychiatric examination of Creswell. We thus dismiss the defendant Cecil's individual claims of error in these rulings. Secondly, we dismiss as without merit the challenge by all the defendants to the use of the Voter Registration List of Maryland for use as the sole source for a random

selection of the jury panel herein. Finally, we find no error in the district court's denial of the defendant Hayes' motion for a directed verdict and affirm his conviction. The result of these rulings is that all convictions here are

AFFIRMED.

PHILLIPS, Circuit Judge, concurring in part and dissenting in part:

I concur in Part IV of the majority opinion which affirms Hayes' conviction. I dissent from Part II, which rejects Cecil's claim of prejudicial error in the district court's refusal to allow cross-examination of Creswell respecting his aborted insanity plea; and from Part III, which rejects the several defendants' claim of error in the district court's summary denial of their fair cross-section challenge to the jury array.

I take the refusal to allow cross-examination and jury challenge issues in that order.

I

It is hard to imagine evidence — other than directly exculpating evidence — more critical to a criminal defendant's defense than evidence that a key witness against him is not credible on the matters in issue because of a mental impairment affecting his powers of recall or general reliability. For this reason, despite the obvious added risks of embarrassment and distress to the witness, the rule is that under appropriate circumstances such evidence may be admissible, either by cross-examination of the witness or by independent proof or both. *See United States v. Lopez,* 611 F.2d 44 (4th Cir.1979). Whether, assuming relevance, mental impairment evidence should be admissible in a particular case, given its special risk of prejudice to a witness, is of course committed in the first

instance to the discretion of the trial judge, operating under the general guidance of Fed.R.Evid. 403, of which the *Lopez* rule is simply a special application. Under Rule 403, such evidence, like any, "although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." *Lopez,* emphasizing the special added danger of unwarranted prejudice to the *witness* posed by this type evidence, requires that in exercising discretion in this context, account be taken of whether the asserted

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impairment existed during the period in issue, whether the impairment went to the witness' competency and ability to recall, and whether its revelation would introduce a confusing collateral issue that would require allowing the Government to introduce explanatory evidence. *Id.* at 46. And as a further safeguard, *Lopez* requires that a party seeking to introduce such evidence by any means, make a preliminary offer of proof of the mental impairment evidence, in order to lay a threshold basis for the court's discretionary ruling. *Id.* Obviously, a ruling against admission is then reviewable only for abuse of discretion, with all that that implies for great deference to the trial court's special role and competence in such matters. *Id.*

So, we start with the proposition, which I readily accept, that solicitude for privacy interests and for trial efficiencies give trial courts great latitude for excluding this type evidence. Nevertheless, I am persuaded that under the special circumstances of this case, discretion was abused here; that Cecil should have been allowed to attempt the limited impeachment by cross-examination

that he ultimately sought to make, and that disallowing it denied him the fair trial to which he was entitled.

To start with, any evidence significantly probative of this particular witness' lack of credibility was absolutely critical here. As the majority opinion concedes, not only was Creswell a key witness against Cecil, he was the only witness whose testimony directly linked Cecil to the conspiracy; there was little, if any, circumstantial evidence. Effectively, Cecil's defense was that Creswell's testimony, the only significant evidence against him, was too unreliable to persuade a reasonable fact-finder of guilt beyond a reasonable doubt. And, as bearing directly and heavily upon this, Cecil had indisputable evidence, properly proffered to the court, that Creswell has within the past two years asserted, officially and publicly, that within three years of the events to which he testified he had indeed been mentally impaired — so impaired that he himself should be relieved of criminal liability in another matter. The district court's ruling, or series of rulings, effectively denied Cecil the opportunity to lay any of this critical impeachment evidence before the jury.

The district court's discretion was wide here, but with liberty at stake on the credibility of this single, indisputably criminal, obviously erratic and self-interested witness, I would hold that it was abused here in not allowing Cecil the limited proof that he ultimately sought to make on the matter.

Because trial court discretion depends upon circumstance, it is important in reviewing its exercise to get the context right. And on this, I simply disagree in critical respects with the majority's reading of the record.

On the majority's view, the ruling under review was precipitated in mid-trial by a belated proffer of proof by Cecil which could have been made much earlier. It is then

asserted that what Cecil wanted at that point was to introduce the psychiatrist's contemporaneous certificate and his 1981 letter reports filed in the aborted New York insanity plea proceeding as direct evidence of Creswell's present mental impairment, and to offer the psychiatrist as a live witness for the same purpose. The majority then goes to great pains to demonstrate the inadmissibility of the current "certificate" and the 1981 reports; to question whether the psychiatrist was in fact available as a live witness; and to deride — apparently on medical grounds — the probative value of the psychiatrist's opinions, as reflected in the documents, of the narcissistic nature and Oedipus-complex origins of Creswell's impairment. On that basis, the majority then concludes that the only evidence actually excluded by the district court was the record of the Rule 12.2 proceeding in the New York prosecution, which included the psychiatrist's contemporary reports, and the psychiatrist's current "Certification"; that the district court was never called upon to make any wider ruling excluding "all testimony, cross-examination and argument" related to Creswell's mental condition, as Cecil asserted on appeal; and that because neither of the only two proffered items of documentary evidence was admissible, there was no error in the

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limited ruling which only excluded them. Majority op. 1438, 1444.

With all respect, this misreads the record in ways critical to a proper assessment of the district court's discretionary ruling.

In the first place, the ruling was not precipitated by a belated effort by Cecil to get the evidence in, but by the government to keep it out. The critical information, the linchpin evidence, was that Creswell had in fact given

official notice in 1981 of his intention to enter an insanity plea and had then undergone psychiatric evaluation which tentatively supported his plea. This fact was discovered by defense counsel and communicated to the government, which claims not then to have known of it, well in advance of the government's use of Creswell as a witness. *See* J.A. 231, 232, 251.[14] Cecil's counsel obviously was under no obligation to do more than tell the government, "we have this information, here is the proof in documentary form; be suitably advised," by way of laying a basis for making whatever use of it might be appropriate and permitted at trial. It defies belief, and the government does not represent, that it only became aware at midpoint of trial that Creswell might be cross-examined on the point. Yet its motion in limine to suppress the evidence was only brought on for hearing just before (or possibly after) it put Creswell on the stand. *See* J.A. 217, 218. To the extent that discretion to exclude the evidence might properly take into account the lateness of the issue's raising by

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[14]It is not clear from the record just when Cecil's counsel advised government counsel about Creswell's aborted insanity plea in the New York proceedings, but it was obviously not a bombshell dropped in mid-trial as the majority implies. Majority op. 1434. In Cecil's brief on this appeal, it is asserted that notice was given an assistant United States Attorney by letter back in 1981 (even before indictment), Appellant's Br. 10, and this is nowhere questioned. The record itself shows that Cecil's counsel had provided the government with copies of the New York insanity plea proceedings approximately a week before Creswell began to testify, J.A. 251. In any event, and for whatever relevance it has, it is not accurate to suggest, as the majority opinion does, at 1434, that the evidence issued was first "raised" by Cecil during trial, and that the government only made its motion in limine in response to this sudden development. Actually, of course, Cecil did not "raise" the admissibility issue with the court; the government did, on the basis of information sometime earlier supplied it by Cecil's counsel.

defendant — as the majority suggests — any tardiness here simply could not be laid to Cecil.

Much more critically, the majority opinion, with all respect, is simply wrong in its assertion that the district court's exclusionary ruling was effectively limited to the two documentary items incorporating psychiatric evaluations and that this was the limit of the defendant's proffer of proof. In fact, by a series of rulings the court did — as Cecil rightly asserts — ultimately exclude any and all evidence, whether documentary or testimonial, whether to be adduced on cross or direct examination, having to do in any way and to any extent with the fact that Creswell had given notice of intention to file an insanity plea. As indicated, the process of exclusion was an evolving one over the two day period devoted to the government's motion, but its ultimate scope and its effect was unmistakably total exclusion. Most critically, it excluded all opportunity to conduct *any* cross-examination on the point, which was the only means for developing it actually sought from start to end by Cecil.

The government's formal motion in limine was directly addressed only to the anticipation that defense counsel would cross-examine Creswell about the 1981 insanity plea notice and the related psychiatric evaluation. J.A. 207. It was only to the possibility of cross-examination based upon defense counsel's known knowledge of the indisputable facts of that proceeding that the government sought an exclusionary ruling. J.A. 209. The thrust of the government's initial oral argument in support of its motion was only to forestall cross-examination based upon defense counsel's knowledge. J.A. 220.

At this point, defense counsel had made no proffer of evidence pursuant to the *Lopez* requirement. It was only to meet that requirement that Cecil first proffered the two

documentary items — as substantiation for the propriety of allowing this potentially

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embarrassing and possibly collateral matter to be explored *on cross-examination.* Cecil obviously would have seized at that point upon any opportunity given him to supplement his cross-examination by introducing on direct either the documentary evidence or the psychiatrist's oral testimony. But his opposition to the government's motion in limine specifically sought only to protect his right to cross-examine on the basis of the information known both to him, and through him, to the government, and he never at that point sought a ruling admitting the documentary evidence, though he offered to put the psychiatrist on for voir dire if the court desired. J.A. 266, 278.[15] In fact, as consideration of the motion continued, Cecil emphasized again and again the narrow scope of cross-examination he proposed and would bind himself in advance to conduct. He would limit it to two to three minutes duration and would seek by it basically only to bring out that Creswell had indeed given notice of an insanity plea in the New York proceeding, and then to pursue the inevitable admission only in severely limited ways. He specifically proposed to explore only the extent to which Creswell had participated with his counsel in the

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[15]The majority points out that after all the evidence, including Creswell's testimony, was in, Cecil sought to be allowed to call the psychiatrist as a witness, or, failing that, to put his "certification" in evidence; and the majority for some reason then questions whether the psychiatrist was available even then. In total context, it is obvious that at that late point, having been denied the critical right to cross-examine Creswell, Cecil's counsel was simply protecting the record. The district court had already ruled that no evidence, whether by cross- or direct examination, on the matter of Creswell's insanity plea notice would be admitted.

decision to give notice of the insanity plea, to explore Creswell's recollection of the nature of the psychiatric evaluations then made, to inquire whether Creswell considered himself to have been mentally impaired at that time and subsequently. *See* J.A. 235, 266, 267, 285.[16] He specifically disavowed any purpose to introduce in evidence either the psychiatric reports or the psychiatrist's oral testimony. J.A. 278. When the court expressed concern about opening the door to comparable cross-examination by Cecil's co-defendants, counsel for those defendants expressly waived any right to do so. J.A. 287.

Cecil's counsel also expressly identified and committed himself to limit the arguments he would make based upon any evidence developed by this limited cross-examination. He proposed to exploit it only by arguing alternatively that Creswell was either honestly doubtful about his mental condition in the relatively recent past, or was prepared then deliberately to misrepresent his condition in order to manipulate the judicial process. J.A. 224-25. He expressly committed not to argue that Creswell was insane — at any time. J.A. 287. In this light, it is significant that Cecil's proffer identified a quite legitimate

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[16]A succession of scope-limiting proffers appear at each of the referenced pages of the Joint Appendix. The final comprehensive one, which may be taken as the subject of the court's ultimate exclusionary ruling, was in these words:

> I am going to ask him whether or not he participated in his defense with his lawyer. Whether he was concerned with the case against him. Whether he saw the correspondence that was sent in his behalf. The declaration is filed in his behalf. Whether he consulted and agreed with the activities of his lawyer on his behalf. Whether he entered or attempted to enter a plea of not guilty by reason of insanity. Whether he felt that he had a pathological disorder at that time that he discussed the matters with the doctor in 1981, and prior — that is, in 1980, at the time of the alleged offense. J.A. 267.

impeachment purpose as an alternative to mental impairment. The district court first tentatively, J.A. 260, then finally, J.A. 290-91, refused to allow cross-examination touching on the insanity plea for any purpose, no matter how limited.[17]

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It is obvious that impeachment by cross-examination on either of these bases could have been highly effective here. Contrary to the majority's apparent fall-back suggestion of harmlessness of any error in its exclusion, Majority op. 1442-1443, it might obviously have tipped the balance of doubt about the credibility of a witness so manifestly disposed as Creswell to criminal conduct and to protect his own interests at the expense of others caught up in criminal charges. The appropriate test for harmlessness of error in the exclusion of this evidence is whether we can say "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not swayed by the error." *Kotteakos v. United States,* 328 U.S. 750, 765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946). I cannot say this with fair assurance here. The government's case against Cecil was utterly dependent upon Creswell's otherwise shaky credibility. Cecil was entitled to impeach it by any effective means that could be kept in reasonable bounds as this clearly could have been.

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[17]This appears most plainly from a closing colloquy between the court and Cecil's counsel, Horn, following the district court's final ruling that "I will exclude the matter of claimed psychiatric background of this defendant [sic] in the course of his cross-examination." J.A. 290-91. At that point, the following exchange occurred:

> MR. HORN: Judge, again, just for clarification, does that preclude me from asking whether he joined in the attempt to enter a not guilty by reason of insanity plea?
>
> THE COURT: Yes.

I believe that the district court unfortunately failed adequately to consider the narrowly limited range of cross- examination and argument actually proposed here; instead became unduly concerned with the collateral consequences of admitting evidence that the defendant did not propose to offer when the motion in limine was being considered; and in consequence deprived the defendant of a legitimate opportunity to impeach the sole witness against him by cross-examination on a point that might well have swayed the jury's judgment. I would therefore vacate Cecil's conviction and remand for a new trial.

II

Without minimizing the seriousness to Cecil of the district court's discretionary refusal to allow him possibly vital cross-examination, the district court's summary dismissal of the defendants' challenge to the jury selection process presents the more important issue for precedential purposes. For that ruling, as affirmed by the majority here, has critical implications both for the ongoing administration of the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861, et seq. (the Act), and for future applications of the underlying "fair-cross-section" guarantee of the sixth amendment that the Act implements. Because I disagree with the majority's interpretation of both the Act and the underlying constitutional right in critical respects, I dissent from its affirmance of the district court's ruling and from its reasoning to that result.

In order to explain my disagreement, it is first necessary to be clear about the exact basis of the district court's ruling and the majority's alternative bases for affirmance — one "of law," essentially that relied upon by the district court, and the other a factual basis not addressed at all by the district court.

In the district court the defendants properly moved under § 1867(a) to dismiss the indictment for "substantial failure to comply with the provisions of [the Act] in selecting the . . . jury." In support of this motion and in compliance with § 1967(d), defendants filed a sworn statement of facts which, they asserted, "if true, would constitute" such a "substantial failure." Specifically, it was asserted as fact that the juror lists used under the district court's formal Plan were drawn exclusively from Maryland voter registration lists; that recent voter registration lists contained only 60% of those qualified by age to vote, hence to serve on juries; that this therefore automatically excluded 40% of the prospective jurors within the district; that among other groups, black and other racial minorities and persons aged 18-34 tended to register as voters in lower percentages (not specifically known) than did the voting-age population at large; that therefore the 40% of those excluded from jury service by exclusive reliance on voter registration lists probably contained disproportionately large numbers of members of these groups; and that the overall consequence of these facts was believed to be a significant underrepresentation of these particular groups on juror lists, thereby violating the fair-cross-

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section requirement of the Act and the sixth amendment to the Constitution.

In an effort to develop more specific facts to support and flesh out these factual assertions, defendants moved under § 1867(f) for an order requiring disclosure for their inspection and copying of certain records and papers used in the jury selection process. Among the items specifically requested were forms allegedly filed by district court personnel that would reflect the percentages of racial minorities on the jury lists in recent use.

The district court denied the motion for production of the records and papers on the basis that the defendants' motion papers failed to establish a prima facie case of violation of the fair-cross-section requirement of the Act and the Constitution, and that this was a prerequisite to their right to disclosure. The court then denied on the merits the motion to dismiss the indictments, holding that the defendants' motion papers conclusively demonstrated that they could not prove a prima facie case of violation under *Duren v. Missouri,* 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979).

On this appeal, the government has conceded, as it must, *see Test v. United States,* 420 U.S. 28, 95 S.Ct. 749, 42 L.Ed.2d 786 (1975), that the district court erred in denying the disclosure motion. The defendants' factual assertions in support of their motion were sufficient to confer the "unqualified right" to inspect and copy relevant records that is provided by § 1867(f). They need not go further in proof of their claim to establish this right. *See Test,* 420 U.S. at 30, 95 S.Ct. at 750.

But the government then contended that this error was harmless because, as the district court further concluded, defendants' motion papers conclusively demonstrated that defendants could not prove a violation of the Act or the Constitution. Specifically, says the government, as the district court correctly held, even if significant underrepresentation of racial and age groups on the jury lists were established, this would not prove the "systematic exclusion" of "distinctive groups" which the Act and the Constitution forbid. "Systematic exclusion," urges the government, means intentionally discriminatory exclusion of distinctive groups. Here, defendants have only suggested that substantial underrepresentation results from exclusive reliance upon voter registration lists; they have not suggested intentional discrimination either in deny-

ing access to the voter registration process, or in compiling the jury lists. Thus, on the defendants' own allegations, any underrepresentation that could be shown would only be chargeable to the inaction of prospective jurors in failing to register, not to any governmental discrimination. Therefore, accepting all of the defendants' assertions, whether of fact or of probabilities respecting underrepresentation, no violation of the fair- cross-section requirement of the Act or Constitution would be proven.

In sum, the government has argued on appeal that even substantial underrepresentation of distinctive groups that is traceable solely to exclusive reliance on voter registration lists from which members of those groups have freely excluded themselves cannot constitute a violation of the fair-cross-section requirement. Or, put differently, that exclusive reliance upon voter registration lists is per se compliance with the fair-cross-section requirement where no intentional discrimination in composing either voter or jury lists is shown.

As I understand the court's holding today, it essentially adopts this legal position as the primary ground for its affirmance of the district court's dismissal of the jury challenge, *see* majority op. 1444-1451. It then holds alternatively that, in any event, the record on appeal, fleshed out by taking judicial notice of various official data, conclusively demonstrates that no group identified by defendants is both "distinctive" and "substantially underrepresented" on the relevant grand or petit jury venires. Majority op. 1451-1455.

I disagree with both of these alternative grounds for affirmance.

On the much more critical legal ground, I believe that under controlling Supreme Court authority any "substantial

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underrepresentation" of "distinctive groups" on grand or petit jury venires incident to the government's reliance upon voter registration lists as its exclusive source for composing juries violate the fair-cross-section requirement of the Act and the sixth amendment. I think this is so even though the government has not intentionally discriminated against members of the group in either the voter registration or jury selection processes, and though underrepresentation might be traceable ultimately only to the voluntary failure of members of the distinctive group to register as voters in sufficient numbers.

On the alternative ground, I think that the facts are not sufficiently developed on the meager record we review, even when supplemented by judicial notice of the data relied upon by the court, to resolve the critical factual issues, never addressed by the district court, as to whether there may be substantial underrepresentation of at least one "distinctive group" among those identified in the defendant's motion.

I take the legal and factual bases in order.

A

The court's rationale for its legal position — a rationale apparently adopted by a number of other courts[18] —

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[18]The rationale goes back at least to *Camp v. United States*, 413 F.2d 419 (5th Cir.1969), and has at some time apparently been followed by the courts in *United States v. Evans*, 542 F.2d 805, 812 (10th Cir.1976) (asserting that "the circuits are in complete agreement" on the proposition): *United States v. Freeman*, 514 F.2d 171,

focuses on the fact that, absent discriminatory causes, underrepresentation on jury lists that traces to "underrepresentation" on voter registration lists is chargeable only to a free choice of these who have failed to register. Such underrepresented groups cannot therefore be considered "cognizable" under the policies that underlie the Act and, behind the Act, the fair cross-section requirement of the sixth amendment. *See Camp v. United States,* 413 F.2d 419, 421 (5th Cir.1969) (Jehovah's Witnesses "who do not choose to register" not a "cognizable" group).

I simply disagree with that rationale,[19] and believe that intervening Supreme Court decisions flatly undercut it.

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173 (8th Cir.1975) (cited by government) (Indian underrepresentation by "their own indifference" provides no basis for challenge); *United States v. Lewis,* 472 F.2d 252, 255-56 (3d Cir.1973) (cited by government) (no violation where underrepresentation of blacks is "result of their own inaction"); *United States v. Guzman,* 468 F.2d 1245, 1248 (2d Cir.1972) (no supplementation required unless "obstacles [to register] are placed in the paths" of underrepresented group members); *United States v. Ross,* 468 F.2d 1213, 1216 (9th Cir.1972) (no violation where no showing that "right of young persons to register . . . has been inhibited in any way").

[19]As do other federal courts, *See, e.g.,* the following decisions in which, without according presumptive validity to plans relying exclusively on voter registration lists, courts have analyzed claims of underrepresentation solely traceable to that factor; *United States v. Pepe,* 747 F.2d 632, 648-49 (11th Cir.1984); *United States v. Jenkins,* 496 F.2d 57, 64-66 (2d Cir.1974); *Waller v. Butkovich,* 593 F.Supp. 942, 948-58 (M.D. N.C.1984). *See also United States v. Armsbury,* 408 F.Supp. 1130, 1139-40 (D.Ore.1976) (expressly rejecting *Camp* rationale); *United States v. McDaniels,* 370 F.Supp. 298, 301-12 (E.D.La. 1973) (same; semble), *aff'd sub nom. United States v. Goff,* 509 F.2d 825 (5th Cir.1975).

Interestingly, the recent First Circuit cases heavily relied upon by the majority op. 1445-1446, as supporting its position, *Barber v. Ponte,* 772 F.2d 982 (1st Cir.1985) (en banc); *Anaya v. Hansen,* 781 F.2d 1 (1st Cir.1986); and *United States v. Lynch,* 792 F.2d 269 (1st

Starting with *Camp,* the stated rationale of these decisions and now of this court is that it is not unfair — hence does not violate either statutory or constitutional "fair cross-section" requirements — for government

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to exclude persons from jury service for reasons traceable solely to those person's own uninhibited choices. A passage from the Act's legislative history may be the source of the rationale, *see United States v. Armsbury,* 408 F.Supp. 1130, 1140 (D.Ore.1976); certainly it expresses the same notion.

> In a sense the use of voter lists as the basic source of juror names discriminates against those who have the requisite qualifications for jury service but who did not register or vote. This is not unfair, however, because anyone with minimal qualifications — qualifications that are relevant to jury service — can cause his name to be placed on the list simply by registering or voting. No economic or social characteristics prevent one who wants to be considered for jury service from having his name placed in the pool from which jurors are selected.

Cir.1986), do not do so, but to the contrary support the position taken in this dissent. Those decisions merely held that a number of group characteristics — age, type of work, educational level — do not make the relevant groups "cognizable" or "distinct" for fair cross-section underrepresentation purposes, unless made so by specific "invidious" governmental discrimination. *Anaya,* 781 F.2d at 7. But the decisions at the same time expressly recognize that if a group is intrinsically "distinct" or "cognizable" (such as women and racial minorities), a simple showing of significant statistical underrepresentation without regard to cause, constitutes prima facie proof of a violation of the fair cross-section requirement of the Act or the sixth amendment, *Barber,* 772 F.2d at 998; *Anaya,* 781 F.2d at 7; *see also United States v. Marcano-Garcia,* 622 F.2d 12 (1st Cir.1980) (viable underrepresentation claim recognized without proof of intentional discrimination).

H.R.Rep. No. 1076, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.Code Cong. & Ad.News 1794-95.

The problem with this view as a basis for decision — whether as an assumed direct expression of legislative intent or as an independently derived rationale — is that it relates to only one of the policies behind the Act, and not at all to the central sixth amendment right that the Act seeks to implement.

The Act expressly identifies two policies that it seeks to implement: (1) that all litigants "shall have the right to grand and petit juries selected at random from a fair cross section of the community," and (2) that "all citizens shall have the opportunity to be considered for [jury] service." 28 U.S.C. § 1861.

The quoted passage of legislative history and the rationale of the *Camp* line of decisions and now of this court have obvious relevance to the second policy — that of securing to "all citizens" a fair opportunity to *serve* on juries. Therefore, if viewed only from the perspective of the intended beneficiaries of that policy — prospective jurors — it makes sense to hold that when they have excluded themselves, there has been no violation of that policy. But this passage of legislative history and the parallel rationale of the *Camp* line of decisions have no relevance to the first policy — that of securing to *criminal defendants* the right to be charged and tried by jurors randomly chosen from a fair cross section of the community. Consequently, the mere fact that the second policy may not be violated when underrepresentation results from self-exclusion does not mean that the first policy may not be.

That this is so is indeed reflected in other portions of the Act's legislative history that focus on the policy of securing the rights of criminal defendants respecting

juror selection processes rather than the correlative but different rights of prospective jurors to serve. The Act's policy respecting defendant's rights implements and directly mirrors the fair cross-section requirement rooted in the sixth amendment. *See Taylor v. Louisiana,* 419 U.S. 522, 528-30, 95 S.Ct. 692, 696-98, 42 L.Ed.2d 690 (1975); *United States v. Herbert,* 698 F.2d 981, 984 (9th Cir.1983); *United States v. Test,* 550 F.2d 577, 584 (10th Cir.1976); *United States v. Whiting,* 538 F.2d 220, 222 (8th Cir.1976). Reflecting this, the legislative history explains that voting lists "need not perfectly mirror the percentage structure of the community," but nevertheless admonishes that:

> any substantial percentage deviations must be corrected by the use of supplemental sources. [H.R.Rep. No. 1076, at 1794.]
>
> * * *
>
> Jury performance will be enhanced as well by closer approximation of the cross sectional goal under the bill. It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result — biased in the sense that they reflect a slanted view of the community they are supposed to represent [*Id.* at 1797.]
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> * * *

[p. 1464]

> [I]n accord with section 1863(b)(2), voter lists will be supplemented by other sources of names if they do not reflect a community cross section. [*Id.* at 1798.]
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> * * *

> [M]oreover, *the bill recognizes that in some areas voter lists of all kinds may be insufficient to implement the policies of the act, by reason of local voting practices. Where that is true, the plan must prescribe other sources to supplement the voter lists.* [*Id.* at 1799 (emphasis added).]

These excerpts from the Act's legislative history conclusively demonstrate a legislative intent that underrepresentation resulting from exclusive reliance on voter registration lists might violate the Act even though traceable ultimately to self-exclusion by free choice of members of underrepresented groups.

More critically, *Duren v. Missouri,* 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), elaborating on *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), buttresses if it does not compel this reading of the statute by its analysis of the underlying sixth amendment right.[20] Addressing a sixth (and fourteenth) amendment fair-cross-section challenge to a criminal defendant's state court conviction, the Court considered the effect of underrepresentation of women on jury lists resulting from their self-exclusion under a state law exemption privilege. Assuming that self-exclusion was the

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[20] *Duren* was decided after the last of the *Camp* line of decisions cited in note 18, supra. For that reason, it may be questioned whether those decisions are still considered authoritative on the issue by the rendering courts. Against this possibility, it must be conceded that some of the courts have, since *Duren,* continued to rely upon pre-*Duren* decisions applying the *Camp* rationale. *See, e.g., Brown v. Lockhart,* 781 F.2d 654, 656 (8th Cir.1986) (citing *United States v. Freeman,* 514 F.2d (171); *United States v. Afflerbach,* 754 F.2d 866, 869-70 (10th Cir.1985) *(citing, inter alia, United States v. Lewis,* 472 F.2d 252).

As can be seen from these cases and those collected in notes 18 and 19, the lower federal courts are probably simply in conflict on the issue.

effective cause of underrepresentation, and concluding that no significant justification for the exemption-privilege had been shown, the court held that "exclusion" by this process was "systematic." *Id.* at 366, 99 S.Ct. at 669. Because the degree of underrepresentation was also found constitutionally unacceptable (less than 15% represented out of 54% eligible), *id,* the Court found the sixth amendment fair-cross-section requirement violated.

Duren thus undermines the critical assumption made by this court that the fair-cross-section requirement only protects against intentional discrimination in the jury selection process; that exclusion of distinctive groups from jury lists is only "systematic" if it results from intentional discrimination. Rather, as *Duren* expressly recognizes, it protects more broadly against any process of jury selection which produces jury master lists on which "distinctive groups" are substantially underrepresented for *any* reasons "inherent" in the process used by government to constitute the lists, i.e., other than the vagaries of change in a random selection process. *Id.* at 366, 99 S.Ct. at 669.[21] Specifically, on the direct authority of *Duren* and *Taylor,* it is now clear that "systematic exclusion" may be found where substantial

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[21] *Duren,* incidentally, identifies the different constitutional sources of the dual policies of the Act, hence the different constitutional tests for violation of the two, and in that process also probably identified the source of the flawed *Camp*-line rationale. Pointing out that the equal protection right of citizens to serve on juries is protected only against intentional denials of the right, the Court distinguished that right (as it might be directly or derivatively asserted) from the sixth amendment fair-cross-section right of defendants. The latter right, the Court noted, is violated by "systematic disproportion itself." *Duren,* 439 U.S. at 368 n. 26, 99 S.Ct. at 670 n. 26.

The *Camp* rationale is thus shown to be opposite only to the equal protection right, not to the sixth amendment right, both of which are sought to be implemented by the Act.

underrepresentation results from self-exclusion by members of the distinctive groups when that self-exclusion is permitted by — is thus "inherent in" — a challenged process.

Therefore, just as the permitted self-exclusion of women leading to their

[p. 1465]

underrepresentation on jury lists was found to violate the constitutional fair-cross-section requirement in *Duren* and *Taylor*, so the alleged underrepresentation of distinctive groups by their self-exclusion from exclusive-source voter registration lists *might* be found here to violate the fair-cross-section requirement of the Constitution and the Act.[22]

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[22]The majority says that *Duren* does not control decision here because there the self-exclusion occurred at the jury selection stage rather than, as here, at the voter registration stage. Majority op. 1449-1451. With all respect, this is a distinction without a difference. Where the governmental process used is one in which the voter registration list is exactly the same as the master jury list, self-exclusion from the one is directly self-exclusion from the other. Here, as surely as in *Duren*, the phenomenon by which the potential master list of potential jurors could be reduced by a process of permitted self-exclusion is "inherent" in the system by which a particular jury venire is ultimately composed. That the privilege of direct exemption from jury service was expressly authorized by statute in *Duren* while the privilege not to register as a voter simply results from the absence of governmental compulsion to exercise the voting franchise here — is equally a distinction without a difference.

On this point the majority cities, *see* majority op. 1450, 1451, the present Chief Justice' comment in denying a stay in *California v. Harris*, 468 U.S. 1303, 105 S.Ct. 1, 82 L.Ed.2d 807 (1984), as making "clear" the correctness of its view. With all deference, I believe a more suitably cautious reference would emphasize the Chief Justice's remark that the issues on which we on this court now disagree "are by no means open and shut questions under *Duren*." *Id.* at 1304, 105 S.Ct. at 1.

B

In its fall-back position, the court holds that even if substantial underrepresentation traceable to exclusive reliance on voter registration lists could constitute a statutory and constitutional violation, the record here, fleshed out by judicial notice, conclusively shows that there is no substantial underrepresentation of any of the distinctive groups tentatively identified by defendants. It may well be that this is the ultimate fact of the matter. Indeed my own instinct is that it quite probably is. But I do not think that under the circumstances we should attempt to make that determination on this appeal. The district court has never, of course, addressed the specific question of statistically significant underrepresentation. On the meager factual record before it, it could not have. This court has now sought to flesh out the record by taking judicial notice of certain census data concerning national, regional and Maryland voter registration percentages involving blacks and whites (and in a most amorphous way, different age groupings). The court confidently asserts that the data it has selected is the appropriate data and that it conclusively demonstrates that none of the identified groups are substantially underrepresented.

Again, my instinct is that the court' selected data, at least that related to black and white voter percentages in the Maryland district as of November 1982, is probably the most appropriate available data concerning voter registration figures for those groups and that it is accurate. But this data has never been subjected to adversarial party scrutiny. The course of proceedings in both the district court and this court have provided no opportunity for that. And, even more critically, all the data stops at the level of voter registration percentages. While it may be assumed, as the court obviously does, that there has been no contrivance or slip-up in converting voter

registration lists directly to master jury lists, this can only be assumed by this court. The challenge here is not — as the court continually seems to believe — to underrepresentation on voter registration lists or to the use *vel non* of those lists as the exclusive source of master jury lists. The challenge — at this stage avowedly tentative — is to underrepresentation on the master jury lists from which jury venires and panels are required to be drawn randomly. This, not corruption of the voting franchise, is what the Act is designed to guard against, 28 U.S.C. § 1861 (policy declaration). And it is data showing the ultimate composition of master jury lists and venires that the Act allows defendants to discover in order to perfect their tentative challenges. 28 U.S.C. § 1867(f). The critical datum, therefore, is that showing

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the representation of any groups determined to be "distinctive" on the master jury lists at the critical time. That datum is simply not in the record even as expanded, and although it is supposed perfectly to match the voter registration lists, that can only be assumed on the present record.

Even though the risk of factual error in making the underrepresentation determination on this judicially expanded record may be thought minimal, it is clearly present. In my view, with the case at this stage, considerations of delay and judicial economy simply do not justify running that risk. I would therefore vacate the judgments and remand to the district court for reconsideration of the jury selection challenge after defendants have been allowed to inspect, reproduce, and copy the jury selection records whose disclosure they have sought and erroneously been denied. *See Test v. United States,* 420 U.S. 28, 30, 95 S.Ct. 749, 750, 42 L.Ed.2d 786 (1975); *United States v. Lawson,* 670 F.2d 923, 930 (10th Cir.1982); *United*

States v. Marcano-Garcia, 622 F.2d 12, 18 (1st Cir.1980). This would obviously not require wholesale reversal of the convictions. Jurisdiction should be retained in this court for the limited purpose of reviewing the district court's ruling on the properly considered challenge. If the district court denied the challenge, it could be authorized simply to reinstate the judgments of conviction (except that of Cecil). *See Marcano-Garcia,* 622 F.2d at 18.[23]

III

At this point it seems appropriate to address the parade of practical evils that the court suggests must attend all underrepresentation challenges that are not confined narrowly to intentional discrimination. *See* majority op. 1454-1455. These are apparently advanced both to support the court's narrow reading of the permissible basis of challenge intended by the Act, and possibly to

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[23]The remand I propose would of course express no opinion on the ultimate merits of the jury selection challenge. It would simply direct consideration of the challenge under the proof scheme outlined in *Duren.* Under that scheme a challenge establishes a prima facie violation by showing that (1) there is a distinctive group (or groups) in the community (2) which is substantially underrepresented on relevant jury venires in relation to its numbers in the community (3) due to systematic exclusion of group members in the jury selection process. *Duren,* 439 U.S. at 364, 99 S.Ct. at 668.

The holding I propose in this dissent would only have decided prong (3) in this scheme: that any "underrepresentation of distinctive groups traceable to exclusive reliance on voter registration lists would be "systematic exclusion."

Even if a prima facie violation were shown, the process might yet be found not to violate the fair cross section right if the government proved that "attainment of a fair cross section [is] incompatible with a significant state interest." *Id.* at 368, 99 S.Ct. at 670.

This is obviously business for trial courts rather than appellate courts attempting to act in the first instance on records largely constructed by unchallengeable judicial notice.

justify the court's venture into appellate fact-finding in order to spare the district court that function in this case.

With all respect, the court's assumptions and fears are considerably overwrought.

In the first place, the possibility of such challenges in any criminal case has been expressly created by Congress, as an integral part of the Act's approved plan regime. It is obvious that the predominant purpose is to provide a means for questioning whether approved plans relying exclusively upon voter registration lists are actually providing the fair cross section of jurors that the Act is designed to insure. That they may not over time continually do so, for whatever reason, is obvious, and Congress clearly assumed that they might not always do so. The procedure for mounting such challenges is not therefore, as the court seems to suggest from time to time, a contrivance of the defendants in this case, but is a safeguard deliberately designed by Congress to justify primary reliance on voter registration lists. We obviously may not negate a procedure provided by Congress because of concerns about its possible abuses.

Being available, the procedure is certainly subject to abuse by irresponsible defense counsel and the court here is obviously much concerned with that possibility. But

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there is ready practical protection against that risk which, if effectively used, will substantially minimize the dread consequences that the court envisions.

This protection lies in effective advocacy by government counsel and effective management of the challenges by district courts. If these occur, not only may nonmeritorious specific challenges be summarily (but properly) disposed of, but the scope of future challenges may be systematically narrowed by *stare decisis.*

In meeting an underrepresentation challenge to the jury array, the government may always of course deny at the threshold that particular groups identified as "distinctive" by the challenge are indeed so. This will present an issue that can ordinarily be determined as a matter of law under well-developed legal principles. For example, the First Circuit has now, by that process, pretty effectively narrowed to racial minorities and women the groups that will be considered cognizable in that circuit, specifically ruling out groups based on age, educational level, and economic class.[24] As a matter of fact, the District Court for the District of Maryland has earlier held that "age alone does not define a distinct group," *United States v. Blair,* 493 F.Supp. 398, 406 (D.Md.1980), *aff'd on other grounds,* 665 F.2d 500 (4th Cir.1981), and that precedent could of course have been directly applied here to reject the 18-34 age group challenge.

Beyond this threshold means of summarily rejecting claims for lack of group cognizability, there is an almost equally ready means for summarily but properly rejecting nonmeritorious claims of substantial underrepresentation of admittedly "cognizable" groups. As indicated earlier, the critical datum on underrepresentation is the proportional representation of cognizable groups on the relevant *master jury lists* and *venires.* There is no apparent reason why this datum cannot be presented quickly and decisively by government counsel to demonstrate that exclusive reliance on voter registration lists is not producing substantial underrepresentation of particular groups on the relevant jury lists and venires. To fail to do so on the basis that the challengers have the burden to prove underrepresentation would seem the height of folly. In-

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[24] *Barber v. Ponte,* 772 F.2d 982 (1st Cir.1985) (en banc); *Anaya v. Haman,* 781 F.2d 1 (1st Cir. 1986); *United States v. Lynch,* 792 F.2d 269 (1st Cir.1986).

deed it would seem no great administrative inconvenience for the persons charged with administration of approved jury plans to maintain on a continuously updated basis the data as to those groups clearly established as "cognizable" under controlling precedent. By the development of precedent, these groups may well be narrowed fairly quickly (possibly, as in the First Circuit, essentially to women and the dominant ethnic minority). Under such an administrative regime, which might well be specifically directed by district courts, this evidence would be readily available to government counsel for quick and effective use to forestall nonmeritorious underrepresentation claims at the threshold.

As the majority points out, experience is demonstrating the wisdom of Congress' authorization of primary reliance on voter registration lists as the source of master jury lists and ultimately of venires. This should work and it demonstrably is working. But that the national experience has demonstrated the wisdom of the legislative judgment does not of course confer a general immunity to specific challenges of specific district plans. The answer in individual districts lies rather in wise utilization by government counsel and the district courts of the ready means for demonstrating that the national experience holds true for the district.[25]

A.

In sum, I disagree most critically with the majority's primary holding that the Act and the underlying sixth amendment fair cross section requirement protect only against intentional discrimination. I

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[25]Of course, there is another safeguard agaisnt flagrant abuses of the challenge procedures: the inherent power of the district courts to discipline attorneys.

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believe instead, that the Act, implementing the sixth amendment, goes beyond the prohibition of intentional discrimination and requires that where substantial underrepresentation exists by virtue of exclusive reliance on voter registration lists, affirmative measures must be taken to insure realization of the fair cross section requirements. *See United States v. Jenkins,* 496 F.2d 57 (2d Cir. 1974).

Beyond this, I also disagree with the court's effort to decide on this appeal that in fact there is no substantial underrepresentation of any group suggested by defendants. That determination is one properly made in the first instance by the district court, which has not yet addressed it, and which could now determine it without undue burden and without significant disruption of the progress of this case to its conclusion.

Judge WINTER and Judge MURNAGHAN have asked to be shown as joining in this separate opinion.

APPENDIX B

Order of the District Court for the District of Maryland Granting the Governments Motion *in limine*.

MR. ALLEN: I have no intention to get into them in cross-examination.

THE COURT: I think I would be derelict if there was anything the Government had done for this man, if I did not permit counsel — you can demand to see it — if I did not put it in. It would be a very, very doubtful procedure on their part to have done something for a testifying, immunized witness and not make it fully available to defense counsel. I think it would be really reprehensible not to give you a shot at everything that they have done for him.

MR. ALLEN: The record should reflect that Mr. Horn was provided copies of those letters before trial.

MR. HORN: I do have copies. Judge, I would like to revise my estimate as to how much time I would spend on this subject with Mr. Creswell. I said three minutes earlier. I now assure the Court it will only be two minutes or less.

THE COURT: All right. Where are we now? Has everybody quieted down?

MR. ALLEN: Yes, Your Honor. Just one last point from the Government. We would like a ruling before Mr. Creswell testifies, because if the Court is going to let it in, we may want to have to deal with it in direct.

THE COURT: I understand that. Gentlemen, essentially what we are talking about is Rule 403, and Rule 403 expressly provides that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. The early case, which interprets the

Court's obligations under Rule 403 is Lopez in 611 F.2d 44, and Judge Russell there made it perfectly clear that, "One's psychiatric history is an area of great personal privacy which can only be invaded in cross-examination when required in the interest of justice. This is so, because cross-examination of an adverse witness on matters of such personal privacy, if of minimal probative value, is manifestly unfair and unnecessarily demeaning to the witness.

Moreover, such cross-examination will generally introduce into the case a collateral issue, leading to a large amount of testimony, substantially extraneous to the essential facts and issues of the controversy being tried.

Because of the obvious unfairness of such cross-examination and its needless waste of judicial time, it has been posited in an authoritative text that, "The Court should have the power to protect witnesses against cross-examination that does little to impair credibility, but that may damage their reputation, invade their privacy, and assult their personality", and says Judge Russell, Rule 403, Federal Rules of Evidence, provides the courts with the power to do just this." The suggestion which is contained in that, that the court look to the question of substantially extraneous material, seems to me to be the dominant issue in this case. The mental state or absence of mental state of diminished capacity or lack thereof of Creswell, as at 1977 when he is alleged to have jumped bond, by virtue of his reaction, if it did occur that way, to his mother's death and the breaking of the strong mother-son ties, seems to me to be utterly and completely extraneous to the present case. Basically, we are not talking about a state of mind which existed, or mental examination and treatment rendered for mental disease or mental defect during the time when the witness is said to have obtained the information about which he is testifying. That is the situation which does, in fact, exist in the SIGMA case, *U.S. v. Society of Independent Gasoline Marketers.* There, one of the executives of one of the oil companies involved

was, indeed, under treatment and his mental condition had caused him to be removed from his office for treatment on several occasions during the precisely relevant time about which he was testifying. There, Judge Blair was reversed as to that aspect of the case, because it was said he should have permitted access to the hospital records and permitted examination so that Ashland, the defendant, who was involved could have used the records of the former vice president and that that was prejudicial error. Basically, however, what is really controlling in this case is that the Partin case, which is one of the ancestor cases, a 1974 case out of the 5th Circuit, points to the fact that the defendants have a right to challenge the credibility of a witness with competent or relevant evidence of any mental defect or treatment at a time probatively related to the time period about which he was attempting to testify. I find, as a fact, that the 1977 condition which is the subject matter of the 12.2 ruling in New York, a 12.2 filing having been found to have been late made, that the suggestion that the attorney was the author, and that it was his consideration of the possibility of a guilty plea or of a not guilty plea based on insanity, would involve this Court in a substantially extraneous issue of whose idea was it, how did it bring up — how was the issue brought up — what was the timeliness of the 12.2 motion, what was ultimately the disposition of the Court, and that, as a result, there would be an inordinate amount of extraneous material which does not deal with the essential facts of this case.

On the tender of proof which is before me, I do not find that there has been adequate proof that there would be anything which would be substantially helpful in the case on cross-examination, which would permit the use of such personal and private material to be invaded in cross-examination. In my opinion, there would be minimal probative value in light of the manifest and manifold other attacks on this witness available to defense counsel, and it is, as Judge Russell said, manifestly unfair and unnecessarily demeaning to the witness.

In the judgment of the Court, therefore, I will under rule 403 exclude that line of cross-examination. This is subject to reconsideration if one or more of the defendants, through their counsel, bring me relevant evidence bearing on this issue as to what the extent of the psychiatric report would have shown, but I cannot, under the circumstances, believe that any judge would permit such a report to come in on 12.2 dealing with a 1977 series of events unless it dealt with diminished capacity as at 1977, and I am unprepared to accept dictionary definitions of the various psychiatric states which are said to be involved as a conclusive basis for action. Accordingly, under Rule 403, I will exclude that line of questioning.

All right, let's take a short break and then we will take the witness.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,
Plaintiff,
v.
ODUS HAYES, et al.,
Defendants.

Criminal No. R-81-00533

MEMORANDUM AND ORDER

This action arises out of an indictment[1] charging twenty-four named defendants and other unindicted co-defendants with participation in a scheme to import and distribute approximately 36,000 pounds of marijuana in the form of hashish into the United States. Defendants Patrick Haddix, Odus Hayes, Craig Passwaiter, Alan Crispi, Ronald Cecil, Sam Giordano, Kathi Giordano, Kim Passwaiter, and Gary Jensen have each been charged with the following offenses: (1) conspiracy to import into the United States and to possess with intent to distribute in excess of 1,000 pounds of marijuana in the form of hashish, a Schedule I non-narcotic controlled substance, in violation of 21 U.S.C. §§ 952(a), 841(a)(1) and (b)(6) (count 1); (2) importation of marijuana in the form of hashish, in violation of 21 U.S.C. § 952(a), and aiding and abetting, in violation of 18 U.S.C. § 2 (counts 2, 3, and 4); and (3) possession with intent to distribute marijuana in the form of hashish, in violation of 21 U.S.C. § 841(a)(1),

[1]Each of the defendants whose pretrial motions are presently before the Court was charged in a superseding indictment filed on May 26, 1982.

and aiding and abetting, in violation of 18 U.S.C. § 2 (count 5).

* * * *

V.

MOTIONS FOR PRODUCTION INSPECTION, AND COPYING OF RECORDS AND PAPERS IN CUSTODY OF AND USED BY JURY CLERK IN CONNECTION WITH SELECTIONS OF GRAND AND PETIT JURORS.

Defendants Sam and Kathi Giordano and Ronald Cecil have filed motions for the production, inspection, and copying of records and papers in the custody of and used by the jury clerk in connection with the selections of the grand and petit juries that returned indictments in this action, pursuant to the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.* (as amended) (hereinafter the "Act"). In support thereof, these three defendants essentially argue that the procedures of the "Plan of the United States District Court for the District of Maryland for the Random Selection of Grand and Petit Jurors" (hereinafter the "Plan") violates the Sixth Amendment to the United States Constitution and the Act in that the Voter Registration List, from which grand jurors in this District are selected, is underinclusive and lacks a fair cross-section of the classes of persons residing in Maryland. Defendant Cecil alone specifically alleges that the Plan has resulted in the underrepresentations of qualified adult citizens of Maryland generally, due to the fact that only approximately 60% of eligible voters in Maryland have registered to vote; blacks; and persons between 18-34 years of age. Defendant Cecil also alleges that the selection procedures contained in the Plan are not random, as required by the Constitution and the Act. Defendants Giordano allege that the operation of the Plan causes underrepresentation of minorities, the handicapped, and the poor.

Section 1861 of the Act provides in pertinent part that "it is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a *fair cross section* of the community in the district . . . where the court convenes." 28 U.S.C. § 1861 (emphasis added). This "policy" is implemented by the requirement of section 1862 that "[n]o citizen shall be excluded from service as a grand or petit jury in the district courts of the United States on account of race, color, religion, sex national origin, or economic status." 28 U.S.C. § 1862. Section 1863(b)(2) expressly directs the district courts to use voter registration lists or lists of actual voters as the initial sources of names for prospective jurors, and to "prescribe some other service or sources of names in addition to voter lists *where necessary* to foster the policy and protect the rights secured by sections 1861 and 1862 . . ." 28 U.S.C. § 1863(b)(2) (emphasis added). Section 1867(a) of the Act provides that in criminal cases, "the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of *substantial failure* to comply with the provisions of this title in selecting the grand or petit jury." 28 U.S.C. § 1867(a) (emphasis added).

With regard to gaining access to the information that defendants herein request, the Act contains two provisions which are relevant to the disposition of these motions. First, section 1867(d) provides in pertinent part that "[u]pon motion filed under subsection (a) . . . , containing a sworn statement of facts which, if true, would constitute a *substantial failure* to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion . . . . any relevant records and papers . . . used by the jury commissioner." 28 U.S.C. § 1867(d) (emphasis added). Section 1867(b) provides in pertinent part that "[t]he contents of records or papers used by the jury commissioner clerk in connection with the jury selection process shall not be disclosed, except . . . as may be necessary in the preparation or

presentation of a motion under subsection (a) . . . The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such motion." 28 U.S.C. § 1867(f).

As a preliminary matter, the Court finds that defendants have standing to present these motions even though they are not members of some of the allegedly excluded classes in the grand jury pool. *See Taylor v. Louisiana,* 419 U.S. 522 (1975); *Peters v. Kiff,* 407 U.S. 493 (1972).

The Court also finds as a preliminary matter that the constitutional "reasonably representative" standard of the Sixth Amendment and the statutory "fair cross section" standard for determining the validity of a jury selection plan are identical. *See, e.g., Taylor v. Louisiana,* 419 U.S. 522, 528-30 & n. 11 (1975) (dictum); *United States v. Coats,* 611 F.2d 37 (4th Cir. 1979), *cert. denied,* 446 U.S. 909 (1980); *United States v. Test,* 550 F.2d 577, 584-85 (10th Cir. 1976); *United States v. Whiting,* 538 F.2d 220, 222 (8th Cir. 1976); *Anderson v. Casscles,* 531 F.2d 682, 685 & n. 1 (2nd Cir. 1976) (dictum); *United States v. Blair,* 493 F.Supp. 398, 405-06 (D. Md. 1980), *aff'd,* 665 F.2d 500 (4th Cir. 1981).

It is well-settled that "juries must be drawn from a source fairly representative of the community" and that "jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Taylor v. Louisiana,* 419 U.S. 522, 538 (1975). However, "[i]t should also be emphasized that in holding that petiti juries must be drawn from a source fairly representative of the community we impose no requirement that petiti jurors actually chosen must mirror the community and reflect the various distinctive groups in the population." *Id.* Defendants are not entitled to a jury venire that is a "statistical mirror of the community from which it is drawn." *United States v. Blair,* 493 F.Supp. 398, 406 (D. Md. 1980), *aff'd* 665 F.2d

500 (4th Cir. 1981), *quoting Swain v. Alabama,* 380 U.S. 202, 208 *reh'g denied,* 381 U.S. 921 (1965), and *United States v. DiTammaso,* 405 F.2d 385, 389 (4th Cir. 1968), *cert. denied,* 394 U.S. 934 (1969). Other caselaw in this jurisdiction and elsewhere uniformly establish that the jury selection system is not required or expected to provide statistical perfection. *See e.g., Mobley v. United States,* 379 F.2d 768, 772 (5th Cir. 1967); *Chestnut v. People of State of New York,* 370 F.2d 1, 6-7, n. 13 (2d Cir. 1966), *cert. denied,* 386 U.S. 1009 (1967); *Rabinowitz v. United States,* 366 F.2d 34, 59 (5th Cir. 1966); *Chance v. United States,* 332 F.2d 201, 204-05 (5th Cir. 1963); *cert. denied,* 379 U.S. 823 (1964); *Gorin v. United States,* 313 F.2d 641, 644 (1st Cir.), *cert. denied,* 374 U.S. 829 (1963), *appeal after remand sub. nom., Grillo v. United States,* 336 F.2d 211 (1st Cir. 1964), *cert. denied,* 379 U.S. 971 (1965); *United States v. Henderson,* 298 F.2d 522, 525 (7th Cir.), *cert. denied,* 369 U.S. 878 (1962); *United States v. Flynn,* 216 F.2d 354, 378, 388 (2d Cir. 1954); *United States v. Dennis,* 183 F.2d 201, 224 (2d Cir. 1950); *United States v. Cohen,* 275 F.Supp. 724, 742 & n. 21 (D. Md. 1967), *aff'd,* 405 F.2d 385 (4th Cir. 1968), *cert. denied sub. nom., Warrgaman v. United States,* 394 U.S. 934 (1969); *United States v. Hunt,* 265 F.Supp. 178, 187, 190-91 (W.D. Tex. 1967); *United States v. Duke,* 263 F.Supp. 828, 831, 834 (S.D. Ind. 1967). Systematic exclusion, however, must be proven; it will not be presumed. *See e.g., Swain v. Alabama,* 380 U.S. 202 (1965), *reh'g denied,* 381 U.S. 921 (1965); *Tarrance v. Florida,* 188 U.S. 519 (1903); *United States v. Espinoza,* 641 F.2d 153, 168 (4th Cir. 1981), *cert. denied,* 454 U.S. 841 (1982). The burden rests on defendant to establish a violation of the fair cross-section requirement. *See Duren v. Missouri,* 439 U.S. 357, 366 (1978); *Akins v. Texas,* 325 U.S. 398 (1945); *United States v. Espinoza,* 641 F.2d 153, 168 (4th Cir. 1981), *cert. denied,* 454 U.S. 841 (1982); *United States v. Blair,* 93 F.Supp. 398, 406 (D. Md. 1980), *aff'd,* 665 F.2d 500 (4th Cir. 1981).

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1978).

These previously mentioned standards governing the fair-cross-section-of-the-community requirement for the sources of juries must be applied to the Act for the purpose of ruling on defendants' motions. As mentioned earlier, the rule of the Act is that the information which defendants seek is not to be disclosed. *See* 28 U.S.C. § 1867(f) (first clause). Section 1867(f), however, contains an exception to the rule which provides that such disclosure be made "as may be necessary" in preparation for a motion under 28 U.S.C. § 1867(a). *See* 28 U.S.C. § 1867(f). Defendants herein have filed such motions. In *Test v. United States,* 420 U.S. 28 (1975), the Supreme Court held that section 1867(f) provides that "... a litigant has essentially an *unqualified* right to inspect jury lists," and that such right is "required not only by the plain text of the statute, but also by the statute's overall purpose of insuring 'grand and petit juries selected at random from a fair cross section of the community.' 28 U.S.C. § 1861" *Id.* at 30 (emphasis in text).

However, a plain reading of the entire statutory scheme underlying the Jury Selection and Service Act of 1968 and controlling caselaw subsequent to *Test v. United States* clearly establish that the "unqualified" right of access provided in section 1867(f) is indeed qualified. Specifically, *Duren* holds that defendant bears the burden of proof in a three-step test to show a violation of the fair cross-section requirement. *Duren,* 439 U.S. at 364. In

addition, the Act by its own terms provides that the moving party must first present facts under oath which, if true, would constitute a "substantial failure to comply" with the fair cross-section-of-the-community requirement in order to present the documents that defendants request. *See* 28 U.S.C. § 1867(d) and (a). While the Act admittedly contemplates that the "substantial failure to comply" standard relates to the burden that the movant bears to prevail on his motions to dismiss the indictment or to stay the proceedings against him, the Court nonetheless finds that Section 1867(a) and (d) should be construed together so as to effectuate Congress' plain intent. Consequently, under a fair reading of both *Duren* and the Act, defendants carry the burden of establishing a violation of the fair cross-section requirement that is substantial enough to warrant the presentation of the documents they request.

The Court finds that defendants have failed to carry their burdens to establish a *prima facie* case of a violation of the fair cross-section requirement, pursuant to the directive of *Duren,* and their motions are denied. First, the first prong of the *Duren* test requires defendants to demonstrate the class which is underrepresented is a "distinct" or cognizable group within the community. *See Duren,* 439 U.S. at 364. A distinct group is one which possesses

> (1) the presence of some quality or attribute which 'defines and limits' the group; (2) a cohesiveness of 'attitudes or ideas or experience' which distinguishes the group from the general social milieu; and (3) a 'community of interest' which may not be represented by other segments of society.

United States v. Blair, 393 F.Supp. at 406, *quoting United States v. Test,* 550 F.2d 557, 577, 591 (10th Cir. 1976). Blacks are such a cognizable group. *See Alexander v. Louisiana,* 405 U.S. 625 (1972). However, contrary to defendant Cecil's argument, controlling law in this jurisdiction holds that age *per se* does not define a distinct

group.[3] *See United States v. Blair,* 493 F.Supp. at 406. *Accord United States v. Potter,* 552 F.2d 901, 905 (9th Cir. 1977); *United States v. Test,* 550 F.2d 577, 591 (10th Cir. 1976) and cases cited therein. *United States v. Butera,* 420 F.2d 564 (1st Cir. 1970), a case decided prior to *Blair,* is simply not controlling in this jurisdiction. The Court need not find whether minorities other than blacks, the handicapped, and the poor constitute cognizable groups for purposes of meeting the first step of the *Duren* test. Defendants Sam and Kathi Giordano's naked allegations that such groups are distinct are insufficient to meet their burdens of proof pursuant to the clear mandate of *Duren.*

Second, the third prong of *Duren* directs that defendants must show that the groups that allegedly are underrepresented were "systematically excluded" from the jury selection process. Caselaw which has considered the question of "systematic exclusion" clearly establishes that there are only two conditions under which such exclusion exists. First, where "... a cognizable group had been *totally* excluded from jury service over a substantial period of time or had received only 'token representation'," these factors were "sufficient to raise an *inference* of discrimination and systematic exclusion." *United States v. Test,* 550 F.2d at 586 (emphasis in text), *citing Taylor v. Louisiana,* 419 U.S. 522 (1975); *Alexander v. Louisiana,*

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[3]Cecil contends that the absence of forty percent of Maryland's citizens who are eligible to vote from the voter registration list constitutes a constitutionally infirm underrepresentation of this group for purposes of the fair cross-section requirement. The Court notes that this allegedly "cognizable" group could be construed to be a class based on age; defendant Cecil specifically has characterized this group as "40 percent of Maryland's residents who are 18 years and older ..." As such, they would not constitute a cognizable group based on the above-cited authorities, and defendant Cecil would not have met his burden under *Duren.* While the Court finds that this ground alone would be sufficient to deny defendant's motion, the Court finds that there are other bases upon which to deny defendant's motion.

405 U.S. 625 (1972); and *Norris v. Alabama,* 294 U.S. 587 (1935). Second, "in cases where there has been a showing of 'substantial underrepresentation' (short of total exclusion) or 'systematic decimation' of a cognizable group at the various stages of the selection process *combined* the 'obvious opportunities for discrimination,' the Court has been willing to infer discrimination in the selection process." *United States v. Test,* 550 F.2d at 586 (emphasis in text), *citing Turner v. Fouche,* 396 U.S. 346 (1970); *Carter v. Jury Commission,* 396 U.S. 320 (1970); *Whitus v. Georgia,* 385 U.S. 545 (1967); *Swain v. Alabama,* 380 U.S. 202, *reh'g denied,* 381 U.S. 921 (1965). The Court finds that the first condition clearly is not present because defendants claim underrepresentation, not total exclusion or token representation. With regard to the second factor, the Court has thoroughly reviewed the Plan in this system and finds (as will be discussed *infra*) that the Plan clearly does not allow for any "obvious opportunities for discrimination." *Cf. Swain v. Alabama,* 380 U.S. 202, *reh'g denied,* 381 U.S. 921 (1965). Consequently, defendants have failed to carry their burdens on the third prong of the *Duren* test.

Defendants are reminded that the Constitution and the Act require that only the *source* from which juries are drawn, not the jury itself, must meet the fair cross-section requirement. *See, e.g., Taylor v. Louisiana,* 419 U.S. 522 (1975). Defendants herein allege that the voter registration list, which is the sole source of prospective jurors in this District, has resulted in underrepresentation in violation of the fair cross-section requirement. In *United States v. Blair,* 493 F.Supp. 398 (D. Md. 1980), *aff'd,* 665 F.2d 500 (4th Cir. 1981), Judge Harvey considered this very issue and his treatment of this question deserves quotation:

> The Jury Selection and Service Act of 1968 specifically requires that voter registration lists be used as the primary source for names of prospective jurors. 28 U.S.C. § 1863(b)(2). The use of voter registration

> lists has been consistently upheld against both statutory and constitutional challenge, unless the voter list in question had been compiled in a discriminatory manner. *United States v. Dellinger,* 472 F.2d 340, 366 (7th Cir. 1972); *Wilkins v. Maryland,* 402 F.Supp. 76, 78 (D. Md. 1975). Congress recognized that the use of voter registration lists in this manner would exclude from jury service those individuals who do not register to vote. However, Congress concluded that such exclusion would not be unfair since no economic or social characteristic would prevent a person from placing his name on the voter registration list. H.R.Rep.No. 1076, 90th Cong., 2nd Sess., reprinted in [1968] U.S. Code Cong. & Admin. News, pp. 1792, 1794-95. *United States v. Briggs,* 366 F.Supp. 1356, 1358-61 (N.D. Fla. 1973).

Id. at 407 *See also United States v. Manbeck,* 514 F.Supp. 141, 145-46 (D.S.C. 1981). After reviewing the jury selection plan for the District of Maryland, Judge Harvey concluded "... that this District's jury plan satisfies statutory and constitutional requirements." *United States v. Blair,* 393 F. Supp. at 410. Although Section 1863(b)(2) of the Act provides that the voter registration lists be supplemented "where necessary" to guarantee the fair cross-section requirement, it appears that the circuits uniformly hold that neither the Act nor the Constitution require that a supplemental source of names be added to voter registration lists simply because an identifiable group votes or registers to vote in a proportion lower than the rest of the population. *See, e.g., United States v. Test,* 550 F.2d 577 (10th Cir. 1976); *United States v. Freeman,* 514 F.2d 171 (8th Cir. 1975); *United States v. Lewis,* 472 F.2d 252 (3d Cir. 1973); *United States v. Ross,* 468 F.2d 1213 (9th Cir. 1972), *cert. denied,* 396 U.S. 968 (1969). In short, the statistics upon which defendants rely in support of their claims of underrepresentation, even if true, are insufficient to establish the type of systematic exclusion required by *Duren* in order to prove a violation of the

fair cross-section-of-the-source requirements of the Act and the Constitution.

Furthermore, defendants' challenges to the Plan in support of their motion are directed entirely to the alleged inadequacy of the source, the voter registration list. Defendants have raised no allegation of deficiency with regard to a specific aspect of the Plan, for example, the procedures surrounding the use of the master jury wheel. The Plan in this District and the nature of allegations raised by defendants here in support of their motions stand in marked constrast to that of the facts and circumstances in *Test v. United States* 420 U.S. 28 (1975) and *United States v. Test,* 550 F.2d 577 (10th Cir. 1976). When the Supreme Court ruled in *Test* that the defendant there had an unqualified right to inspect the identical materials which defendants herein seek, the defendant in *Test* had alleged that the Colorado Plan was constitutionally deficient with regard to the master jury wheel and at all subsequent stages of the jury selection process, including the excuse, exemption, and disqualification categories.

In conclusion, the Court finds that defendants' arguments in support of their motions present insufficient grounds to establish their burden of showing a *prima facie* violation of the fair cross-section requirement, as required by *Duren*; that the identical materials to which defendants here seek access were presented to and considered by Judge Harvey very recently in *United States v. Blair,* 493 F.Supp. 398 (D. Md. 1980), *aff'd,* 665 F.2d 500 (4th Cir. 1981); that *Blair* holds that the Plan for the District of Maryland meets both constitutional and statutory requirements;[4] that the Plan which was considered in *Blair* is substantially similar to the present Plan. The Court adds parenthetically that, notwithstanding the Act's express provision for the production of the materi-

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[4]As to defendant Cecil's representation that the Plan does not operate randomly, defendant's attention is also directed to *United States v. Blair,* 493 F.Supp. at 410.

als defendants here seek and *Test's* mandate such disclosure for the disclosure of such information for the purpose of preparing for a motion under section 1867(a), Congress certainly could not have intended this right of access to serve as a convenient shield or procedural device merely to gain a continuance or delay in the trials of criminal defendants. Consequently defendants' motions are denied.

APPENDIX D

§ 1861. Declaration of policy

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

(As amended Mar. 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 54.)

§ 1867. Challenging compliance with selection procedures

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.

(d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.

(e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex,

national origin or economic status in the selection of persons for service on grand or petit juries.

(f) The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1863(b)(4) of this title and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than $1,000 or imprisoned not more than one year, or both.

(As amended Mar. 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 59.)

APPENDIX E

Rule 35. Determination of Causes by the Court in Banc

(a) **When Hearing or Rehearing in Banc Will be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) **Suggestion of a Party for Hearing or Rehearing in Banc.** A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) **Time for Suggestion of a Party for Hearing or Rehearing in Banc; Suggestion Does Not Stay Mandate.** If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

Rule 47. Rules by Courts of Appeals

Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.

APPENDIX F

The Psychiatric Institute
Saint Michael's Medical Center
268 High Street
Newark, New Jersey 07102
(201) 624-3470

CERTIFICATION

Seymour F. Kuvin, M.D.

1) I, Seymour F. Kuvin, M.D., am over the age of 21 and I am a duly licensed physician in the State of New Jersey and have been so licensed since July 14, 1954.

2) I am senior attending psychiatrist at the Saint Michael's Medical Center in Newark and clinical assistant professor of psychiatry at the New Jersey Medical School.

3) I am licensed to practice medicine in New York and New Jersey.

4) My offices are located at Saint Michael's Medical Center, 268 High Street, Newark, New Jersey 07102.

5) I am competent to testify to the following facts and conclusions contained herein and the same are based upon by personal knowledge.

6) I certify that I performed a psychiatric examination of Richard Cresswell a/k/a Gary Gene Pederson on the dates of May 29 and June 5, 1981.

7) The findings of my examination are documented in the attached psychiatric report marked Exhibit A which I incorporate herein by reference.

8) In addition to the facts and my conclusions set forth in Exhibit A, it is my opinion that the diagnosis contained herein of Mr. Cresswell's condition pertained to his emotional condition for the period of time commencing on or before his flight from the judicial proceedings in the Eastern District of New York through the date of my

examination and report to the court (Exhibit A) — June 8, 1981.

9) It is my further opinion that the facts and conclusions set forth in Exhibit A and those hereafter stated would exist today assuming the absence of any psychiatric therapy and/or counseling by Mr. Cresswell from the date of my examination to this date.

10) To be specific, I found Mr. Cresswell to be suffering from a Narcissistic Personality Disorder, DSM 301.81. This is a mental illness which produces an exaggeration of one's achievements; grandiosity; fantasies of unlimited success and power. It also necessitates a constant attention and admiration and there is associated cool indifference and lack of empathy for others. There is also interpersonal exploitativeness for the purposes of self-aggrandizement.

11) It is understood that Mr. Cresswell has been offered certain benefits to testify as a witness. The benefits offered would provide temptation to any man; however, conscience structure would intercede and preclude someone with a normal personality pattern from distorting the truth. A witness, from a psychiatric viewpoint, must observe clearly, remember fully, and be able to testify without suppressing or distorting the truth. In this instance, Mr. Cresswell's personality disorder precludes him from providing truthful testimony, in all medical probability, given the cicumstances at hand.

12) Mr. Cresswell is not able to control his actions, by reason of his personality disorder. At the time he was seen, this examiner was of the opinion that because of his mental illness he was not able to comply with the laws that he allegedly violated because his underlying personality disorder was of such a driving force that he was in need of creating his own power structure and, yet, exhibiting an indifference for the welfare of others (with the one exception of his almost pathological attachment to his mother.) This further indicates that pervasiveness of the

personality deficits are, indeed, going to create distortions and suppressions purely for the purposes of self-gain.

13) At the time of my examination, it was quite clear that he would do anything to manipulate the judicial process for purely selfish reasons.

14) I have reviewed a plea agreement dated 4/13/82 (four pages) signed by Mr. Cresswell. There are sufficient inducements and opportunities offered in that agreement to provide stimulus to Mr. Cresswell so that in the face of this personality disorder, there is little likelihood of his testimonial capacity being credible.

15) I solemnly declare and affirm under the penalties of perjury, and the facts stated herein are true and my conclusions are within a reasonable degree of medical probability.

S.F. KUVIN, M.D., L.S.

March 23, 1983

THE PSYCHIATRIC INSTITUTE

Saint Michael's Medical Center
268 High Street
Newark, New Jersey 07102
(210) 624-3470

Seymour F. Kuvin, M.D.
and Associates

June 8, 1981

PSYCHIATRIC EVALUATION

Richard Creswell
Birthdate: 6/19/48

Mr. Creswell was examined on 5/29/81 for a period of two hours and again on 6/5/81, on two occasions of one hour each. Although Mr. Creswell was cooperative and candid throughout the entire examination, there was objectively noted an emptiness and, at times, inappropriateness of affect. With provocation, he became noticeably tense but never appeared to be capable of expressing anger or hostility.

The examination consisted of observations of verbal as well as non-verbal behavior and using for a vehicle the obtaining of historical data.

Mr. Creswell's childhood life was not very stable inasmuch as his father, Richard, died at the age of 50, in 1954 of liver cirrhosis, due to alcoholism. In fact, his death resulted from pneumonia complicating the treatment of fractured legs which he incurred falling down the stairs while drunk. Mr. Creswell's father was divorced from his mother when Mr. Creswell was 3 years of age and had only visited his son once in 14 years.

Mr. Creswell's mother had the burden of rearing her sons. She died in 1977 at the age of 54 of metastatic complications of ovarian cancer.

Mr. Creswell was mostly reared on his maternal grandparents' farm in Minnesota. It was located north of Magnolia, Minnesota and he lived there until 1963. His grandfather, Fred Frahm, died in 1963 of a cerebral vascular accident. He stated that his grandfather was rather aloof and tired of children and that he did not maintain much of a relationship with him. His grandmother, Hazel Frahm, died shortly after the death of her husband, after she successfully made a suicidal attempt by hanging.

His attachment to his mother became inordinately close and later in life he would call her more frequently than weekly.

Mr. Creswell graduated from Luvern High School in 1966 with average grades. He was not athletic and he stated that English and History were his best subjects. His worst were the sciences. He characterized himself as being in the "beerdrinking crowd". Mr. Creswell expressed the fact that he did not particularly care for the town of Luvern, inasmuch as it was a small town of 5,000 and "everybody knew everybody else's business."

Mr. Creswell has one brother, Patrick James, age 31, but he has had no contact with him since 1977. His brother was last known to be in Portland, Oregon and although Mr. Creswell proclaims he is not estranged from his brother, he was unable to give any reasons for his noncommunication. He attributes it to the fact that he criticized his brother for not providing the constant attendance to his mother as he, himself, had done.

Mr. Creswell attended Worthington Junior College for a semester while selling clothes in Luvern. He subse-

quently attended Mankada State College in Minnesota from 1967 to 1968 but only obtained C & D grades. Following that he had a series of positions including selling cookware from door to door; selling clothing in a department store; working in the post office, etc. None of these were of any substance or leading to any successful career.

He was finally drafted in the fall of 1968 but failed the physical examination and was classified as 4F. After that he traveled going on camping trips and joining the Merchant Marines for a brief period of time.

Mr. Creswell then told of his calling home only to find his mother not there. He anxiously called his uncle, Dale Frahm, and was told that his mother had cancer. He immediately returned home and remained with his mother from the spring of 1976 to February of 1977. During this period of approximately one year, he maintained constant attendance to his mother. He stated his day began at 7:30 when she would ring his bell and he would literally have to lift her out of bed and bring her into the bathroom where he would tend to her colostomy bag and aid her in performing morning ablutions. He stayed with her and was afraid to leave her. He stated that one time he did socialize and she telephoned him because of fear and palpitations. He raced home in order to tend to her and obtain an ambulance. During this entire period of time he cleaned the house, prepared three separate meals (he is a vegetarian and requires one sort; his mother had a special diet; and his mother's new husband ate meat.) He did not have much to do with his mother's husband but did maintain good relationships with him.

During this period of time, Mr. Creswell's mother was hospitalized sporadically at Luvern Hospital as well as Sioux Falls, South Dakota, and a hospital in Minneapolis.

Mr. Creswell stated that he left for Santa Barbara in February of 1977 stating that he could not harm his mother by a conviction or imprisonment while she was dying.

MENTAL STATUS

Whenever the conversation referred to Mr. Creswell's mother he became echolalic and would repeat questions in an anxious fashion rather than answer them directly. He was oriented as to time, place and person, however, and does not appear to have any gross memory deficits although he did tell of the vagueness of recall for the events surrounding the arrest. He also does have some spotty memory losses but these were not sufficient so as to suggest organic brain disease (brain tissue injury) but rather were functional in nature.

Associative thought processes are, for the most part, intact. At times he tends to become circumstantial which appears to be predicated on anxiety especially with reference to his mother.

His affective behavior is impaired by anxiety, agitation, and the constant use of the mechanism of rationalization indicating a considerable amount of immaturity. His behavior all through his life has been immature without any evidence of clear, hard responsibility, except notoriously for a pathological attachment to his mother and his responsibilities in that regard. He would provide many rationalizations as to why he would not engage a nurse for the care of his mother and had to attend to her total care himself.

Insight as to how he affects others is impaired. Judgment as tested by test protocols is essentially intact although there are deficits throughout the interview in

terms of his judgmental ability. Reality testing functions are intact with no evidence of hallucinations or delusions.

DIAGNOSIS

Narcissistic personality disorder.

By definition, when personality traits become maladaptive resulting in impairment of social or occupational functions, there appears a mental illness called a personality disorder. At times it becomes difficult to characterize a personality disorder; however, the best characterization in Mr. Creswell's instance is that of a narcissistic personality disorder inasmuch as the criteria are those of an increased or even grandiose sense of self-importance or uniqueness with exaggeration of achievements and talents; a preoccupation with fantasies of unlimited success and power; the requirements of constant attention and admiration; either cool indifference or marked feelings of humiliation and inferiority or emptiness in response to criticism; and the expectation of special favors in taking advantage of others to indulge one's own desires and lack of empathy.

OPINIONS AND RECOMMENDATIONS

Mr. Creswell's illness is predicated on faulty emotional training in early childhood. His father was a nullity emotionally. His mother was his only attachment and his dependency gratification needs and demands upon her became quite evident as did his need to expiate his own guilt feelings toward her in caring for her to the point of providing nursing care for her personally.

In addition, the emptiness described in the diagnosis was clearly present since even when this examiner suggested that he was an immature person of little substance,

he had little emotional response and was indifferent about this examiner's opinions.

With very little training and very little work experience, he has developed fantasies of unlimited success and power even in light of his current legal position.

This examiner is of the opinion that his behavioral pattern in terms of the events that occurred after his arrest is classical. His grandiosity superceded the rules of society. He endowed himself with unlimited powers. This, coupled with his pathological attachement to his mother and his need to protect her in any eventuality produced the resultant leave to Santa Barbara. This examiner is of the opinion that Mr. Creswell's actions are product of his mental illness and precluded him from conforming his conduct to the requirements of the law.

This is a summary report of the three separate interviews and the information obtained therefrom.

If there are any further questions, please feel free to call me.

Respectfully submitted,

SEYMOND F. KUVIN, M.D., F.A.C.P.

SFK: dra

Supreme Court, U.S.
FILED
MAY 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 87-1599

In the Supreme Court of the United States

OCTOBER TERM, 1987

RONALD CECIL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in limiting petitioners' cross-examination of a government witness.

2. Whether the jury selection procedures used in the District of Maryland deprived petitioners of a petit jury drawn from a fair cross-section of the community.

3. Whether the court of appeals had the authority to hear this case en banc without a request by one of the parties.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A87) is reported at 836 F.2d 1431.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1988. A petition for rehearing was denied on February 5, 1988. The petition for a writ of certiorari was filed on March 26, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioners Haddix and Hayes were convicted on one count of conspiracy to import and to possess with intent to distribute more than 1000 pounds of hashish, in violation of 21 U.S.C. 952(a) and 841(a)(1)

(Count 1); three counts of importation of hashish, in violation of 21 U.S.C. 952(a) (Counts 2, 3, and 4); and one count of possession of hashish with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 5). Petitioner Cecil was convicted on Count 5 and acquitted on Counts 1 through 4. Petitioner Haddix was sentenced to a total of eight years' imprisonment and a five-year special parole term. He was also fined a total of $60,000. Petitioner Hayes was sentenced to a total of two years' imprisonment and a two-year special parole term. Petitioner Cecil was sentenced to 42 months' imprisonment and a 42-month special parole term. He was also fined $10,000. The court of appeals affirmed (Pet. App. A1-A87).

1. The evidence at trial, which is not disputed, is summarized in the opinion of the court of appeals (Pet. App. A5-A7). It showed that petitioners were among 22 persons who in 1980 and 1981 conspired to import 36,000 pounds of hashish into the United States. The conspirators took possession of the hashish off the coast of Lebanon, loaded it onto a vessel in the Mediterranean Sea, and placed it onto an ocean-going ship for delivery to Maryland. When the ship reached the Maryland shore, the hashish was unloaded and stored for future distribution. One of petitioners' confederates, Richard Creswell, who later became a government witness at trial, was responsible for leasing the house in Maryland where the hashish was stored. He also leased a nearby apartment that served as the confederates' headquarters. *Id.* at A5-A6.

2. Prior to trial, petitioner Cecil moved for production of the records of the jury clerk for the District of Maryland, contending that the plan for jury selection in that district violated the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, and the Sixth Amendment. He asserted that the voter registration list, from which juries were selected, did not reflect a fair cross-section of the com-

munity, in that it underrepresented blacks and persons between the ages of 18 and 34. Relying on *Duren* v. *Missouri*, 439 U.S. 357 (1979), the district court found (Pet. App. C7) that petitioner had failed "to establish a *prima facie* case of a violation of the fair cross-section requirement" and it therefore denied the motion for production of records. The court explained (*id.* at C10-C11) that "the statistics upon which [petitioner] rel[ied] in support of [his] claims of underrepresentation, even if true, are insufficient to establish the type of systematic exclusion required by *Duren* in order to prove a violation of the fair cross-section-of-the-source requirements of the Act and the Constitution."

3. Toward the close of the government's case and immediately before Creswell was to testify, counsel for petitioner Cecil advised the prosecutor that during his cross-examination of Creswell he planned to use the record of a notice of intention to present a defense of insanity and diminished capacity that Creswell's attorney had filed in connection with a 1981 prosecution of Creswell in the Eastern District of New York. The prosecutor asked the trial court to hold a hearing in limine on the admissibility of that evidence. Defense counsel did not have the pertinent records available at that time, but he represented that they would show that after Creswell was indicted for jumping bond, he filed a "Rule 12.2 Notice" (see Fed. R. Crim. P. 12.2), in which he stated his intention to assert a defense of diminished capacity and insanity. Counsel also proposed to offer a "tentative" statement of Dr. Seymour Kuvin, a psychiatrist who had examined Creswell in early June 1981. In the statement, according to counsel, Dr. Kuvin reported that while he could not "present any finite psychiatric opinions without a psychiatric examination of Mr. Creswell, from the information supplied, it is highly probable that Mr. Creswell exhibited a pathological personality disorder in his most unusual attachment to his mother." Counsel

advised the court that he proposed to devote "two minutes or less" to that line of cross-examination. Pet. App. A9-A10,

The district court held that the proffered evidence was inadmissible (Pet. App. B1-B4). The court explained (*id.* at B2) that Creswell's mental state in 1977—when he was alleged to have jumped bond because of "his reaction * * * to his mother's death and the breaking of the strong mother-son ties"—was "utterly and completely extraneous to the present case." The court distinguished a prior Fourth Circuit case, noting that in the present case "we are not talking about a state of mind which existed * * * during the time when the witness is said to have obtained the information about which he is testifying" (*ibid.*). The court also found that the proposed cross-examination had "miminal probative value in light of the manifest and manifold other attacks on this witness available to defense counsel" (*id.* at B3). The court invited counsel to renew his offer if additional relevant evidence became available (*id.* at B4).

Counsel requested a rehearing on the issue the next day. At that time, he produced the actual Rule 12.2 Notice, a diagnosis of Creswell by Dr. Kuvin based on interviews conducted in May or June 1981 (Pet. App. F4-F9), and a document styled a "Certification" (*id.* at F1-F3), which consisted of an unsworn statement by Dr. Kuvin in March 1983. In his 1981 diagnosis, Dr. Kuvin stated that he found Creswell "cooperative and candid throughout the entire examination," that Creswell was "oriented as to time, place and person," and that he did "not appear to have any gross memory deficits" (*id.* at F4, F7). Dr. Kuvin nevertheless found Creswell to have "spotty memory losses" and he stated that Creswell had "endowed himself with unlimited powers" (*id.* at F7, F9). Dr. Kuvin explained (*id.* at F9) that Creswell had jumped bond because of his "pathological attachement [*sic*] to his mother and his need to protect her in any eventuality." He also stated that, in his opinion, Creswell's

actions were the "product of his mental illness and precluded him from conforming his conduct to the requirements of the law" (*ibid.*).

In the 1983 "Certification" (Pet. App. F1-F3), Dr. Kuvin reported that he had examined Creswell in May and June 1981. Dr. Kuvin stated that, in his opinion, his 1981 diagnosis of Creswell was an accurate account of Creswell's emotional condition from 1977, the date of the bond jumping, through June 1981, the date of Dr. Kuvin's report (*id.* at F1-F2). Dr. Kuvin also stated his "further opinion that the facts and conclusions set forth [in his diagnosis] would exist today assuming the absence of any psychiatric therapy and/or counseling by Mr. Cresswell [*sic*] from the date of my examination" (*id.* at F2). Dr. Kuvin reported that he had reviewed the plea agreement signed by Creswell and stated that in his opinion "[t]here are sufficient inducements and opportunities offered in that agreement to provide stimulus to Mr. Cresswell [*sic*] so that in the face of this personality disorder, there is little likelihood of his testimonial capacity being credible" (*id.* at F3).

The district court held that the Rule 12.2 Notice, the 1981 diagnosis, and the Certification were inadmissible. The court explained that the notice had never ripened into an actual insanity plea and that the balance of the material consisted of unsworn statements on which Dr. Kuvin was not subject to cross-examination. Pet. App. A17.

4. After first hearing petitioners' appeals before a panel, the court of appeals convened en banc and affirmed the convictions by a divided vote (Pet. App. A1-A87). The court first upheld (*id.* at A7-A33) the trial court's order refusing to permit Cecil's counsel to use the Rule 12.2 Notice and the Certification in cross-examining Creswell. It noted (Pet. App. A19) that the material was of "doubtful admissibility" under Rule 12.2(e), since "the notice itself was dismissed by the court as untimely and Creswell abandoned any

attempt to proffer such a plea."[1] In any event, the court held (Pet. App. A20), "it is plain that the district judge was correct in finding that this evidence was irrelevant to the issues in the 1983 prosecution, and, if admitted, would have introduced an extraneous matter that would have required a great waste of judicial time." The court explained that even if Creswell's decision to jump bond in 1977 was prompted by his intense attachment to his mother, that factor was not shown to bear on his credibility in 1983 when Creswell testified at trial (*ibid.*). Moreover, the court stated, to permit the proposed line of cross-examination would have "inject[ed] into this case practically a trial of Creswell's defense to the bail jumping charge" (*id.* at A21). The court also found that the Certification was inadmissible because defense counsel had not made Dr. Kuvin available for cross-examination (*id.* at A22) and because the Certification strayed beyond the appropriate province of expert testimony (*id.* at A25-A28). Finally, the court noted that defense counsel had been able to offer other evidence attacking Creswell's credibility, including his previous use of aliases, his involvement in drug smuggling, his procuring of driver's licenses under false pretenses, and his frequent personal use of narcotics (*id.* at A29-A30).

The court of appeals next rejected (Pet. App. A33-A57) petitioners' challenge to the jury selection procedure. It noted that the use of voter registration lists as the source for a jury wheel "has been expressly sanctioned by Congress" (*id.* at A33) and has been uniformly approved by the courts of appeals (*id.* at A40-A41). The court explained

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[1] The court recognized that subsection (e) of Rule 12.2 did not become effective until shortly after Creswell's 1983 trial, but it explained that "the Report of the Rules Committee and the Recommendations of the Judicial Conference were well known before March, 1983" (Pet. App. A20).

that the use of voter registration lists "will not be invalidated because a group chooses not to avail itself of the right to register without any discrimination of any kind" (*id.* at A41). The court also observed (*id.* at A43 (footnote omitted)) that the Maryland jury selection plan had been "approved in the manner required by the statute by the chief judge and the other district judges of Maryland and by the Judicial Council of this Circuit, 28 U.S.C. § 1863(a); and that plan recites affirmatively the combined judgment of both the district court and of this court that 'voter registration lists represent a fair cross-section of the community in the District of Maryland.' " Finally, the court stated (*id.* at A49) that "[e]ven were it to be considered that a substantial underrepresentation of a cognizable group on the voter registration lists because of the failure of members of such group to register may be a ground for requiring supplementation of such list * * * the [petitioners] have not made a proper showing of such underrepresentation to support a showing of that character." The court found petitioners' allegations regarding the underrepresentation of blacks on the voter registration lists in Maryland to be "conclusory" (*id.* at A50) and their data to be out of date (*id.* at A52). The most recent census figures, the court noted, showed that blacks were not significantly underrepresented among registered voters in the District of Maryland (*id.* at A52-A54).[2]

Judge Phillips, joined by two other judges, concurred in part and dissented in part (Pet. App. A60-A87). He agreed that the admissibility of "mental impairment evidence" is "committed in the first instance to the discretion of the trial judge" (*id.* at A60-A61) and that trial courts have "great latitude for excluding this type of evidence" (*id.* at A61).

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[2] The court of appeals also held that there was sufficient evidence to convict petitioner Hayes of conspiracy to possess hashish with intent to distribute it (Pet. App. A57-A59). The petition does not present that issue.

In his view, however, "under the special circumstances of this case" (*ibid.*), the district court abused its discretion in denying defense counsel an opportunity to use the Rule 12.2 Notice and the Certification. Judge Phillips stated that evidence bearing on Creswell's credibility was "absolutely critical" to the defense and that the evidence in question bore "directly and heavily" on that issue (Pet. App. A62). Judge Phillips also disagreed (*id.* at A69-A87) with the court's rejection of petitioner's challenge to the use of voter registration lists for jury selection. He explained (*id.* at A73-A80) that the substantial underrepresentation of a distinctive group from a petit jury venire violates the Jury Selection and Service Act of 1968 even without intentional discrimination in either the voter registration or jury selection processes. And while he agreed that the court had relied on "the most appropriate available data concerning voter registration figures," that the data were "accurate," and that there "quite probably" was no substantial underrepresentation of any cognizable group (*id.* at A81), Judge Phillips concluded (*id.* at A80-A87) that there was not a sufficient factual record to resolve that question. He therefore would have remanded the case to the district court for further proceedings with respect to the fair-cross-section challenge.

ARGUMENT

1. Petitioners first contend (Pet. 7-14) that the trial court erred in disallowing the use of the Rule 12.2 Notice and the Certification of Dr. Kuvin during the cross-examination of Creswell. As petitioners acknowledge (Pet. 7, 9), however, the scope of cross-examination at trial is committed to the discretion of the trial court and will not be reversed unless that discretion is abused. See *Delaware* v. *Van Arsdale*, 475 U.S. 673, 679 (1986); *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974); *Alford* v. *United States*, 282 U.S. 687, 694 (1931).

Pursuant to Fed. R. Evid. 403, the trial court, affirmed by the court of appeals (Pet. App. A20-A21), held that the Rule 12.2 Notice related to conduct that was remote in time and that the evidence was therefore "utterly and completely extraneous to the present case" (Pet. App. B2). Moreover, as the court of appeals suggested (*id.* at A22), the Certification of Dr. Kuvin was hearsay and therefore inadmissible for that reason alone. In any event, as the court of appeals noted (*id.* at A29-A30), defense counsel had been able to marshal substantial evidence, apart from the excluded evidence, with which to cross-examine Creswell—including his use of aliases, his involvement in drug smuggling, and his frequent personal use of narcotics. Under those circumstances, the trial court's decision to exclude the Notice and Certification under Rule 403 was not an abuse of discretion. See *United States* v. *Jamil*, 707 F.2d 638, 642 (2d Cir. 1983); *United States* v. *Diecidue*, 603 F.2d 535, 551 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976).

2. Petitioners next contend (Pet. 15-22) that the trial court erred in denying their request to inspect the jury-selection records and in rejecting their challenge to the use of voter registration lists to select the petit jury venires in the District of Maryland. As we acknowledged in the court below, petitioners were entitled to inspect the jury-selection documents under this Court's decision in *Test* v. *United States*, 420 U.S. 28 (1975). The district court's failure to provide those materials to petitioners was harmless, however, because it is clear that the use of voter registration lists as a source for the petit jury venires in the District of Maryland could not successfully be challenged. Because the claim for which petitioners sought the jury-selection records was clearly without merit, the denial of access to the records did not prejudice them.

We do not dispute petitioners' contention that substantial underrepresentation of distinctive groups on voter registration lists, even in the absence of intentional discrimination, may produce a jury venire that is inconsistent with the dictates of the Sixth Amendment and the Jury Selection and Service Act, 28 U.S.C. 1861 *et seq.* Every court of appeals that has addressed the issue, however, has held that the use of voter registration lists as the source for jury venires does not violate either the Jury Selection and Service Act or the Sixth Amendment. See, *e.g.*, *United States* v. *Afflerbach*, 754 F.2d 866, 869-670 (10th Cir.), cert. denied, 472 U.S. 1029 (1985); *United States* v. *Pepe*, 747 F.2d 632, 648-649 (11th Cir. 1984); *United States* v. *Hafen*, 726 F.2d 21, 22-24 (1st Cir.), cert. denied, 466 U.S. 962 (1984); *United States* v. *Hawkins*, 661 F.2d 436, 442 (5th Cir. Unit B 1981), cert. denied, 456 U.S. 991 (1982); *United States* v. *Warinner*, 607 F.2d 210, 214 (8th Cir. 1979), cert. denied, 445 U.S. 927 (1980); *United States* v. *Brady*, 579 F.2d 1121, 1134 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979). No court of appeals has found the underrepresentation of any group on voter registration lists to be substantial enough to result in a statutory or constitutional violation, or to require the supplementation of the voter registration lists with names drawn from other sources.

Moreover, as the court of appeals explained (Pet. App. A52-A54), and as petitioners do not dispute, the most recent available census data in Maryland disclose no significant disparity between the percentages of blacks and whites who register to vote: approximately 67.5% of all whites of voting age were registered to vote, as compared to 61.4% of all blacks. Those figures reflect a much smaller disparity in the relative representation of blacks and whites on voter registration lists than in many cases in which the use of voter registration lists has been upheld against a Sixth Amendment or statutory challenge. See, *e.g.*, *United States* v.

Pepe, supra; *United States* v. *Tuttle*, 729 F.2d 1325 (11th Cir. 1984); *United States* v. *Butler*, 611 F.2d 1066, 1070 (5th Cir.), cert. denied, 449 U.S. 830 (1980); *United States* v. *Maskeny*, 609 F.2d 183, 190 (5th Cir.), cert. denied, 447 U.S. 921 (1980); see generally *Swain* v. *Alabama*, 380 U.S. 202, 208-209 (1965).[3]

Finally, petitioners' challenge to the use of voter registration lists as the source for selecting juries in Maryland comes on the heels of a comprehensive ruling upholding precisely the same system as satisfying both the Jury Selection and Service Act and the Sixth Amendment. See *United States* v. *Blair*, 493 F. Supp. 398, 407 (D. Md. 1980), aff'd, 665 F.2d 500 (4th Cir. 1981). The court of appeals relied in part on the *Blair* case in upholding the Maryland jury selection system, and petitioners have not suggested how they could have succeeded in their challenge to that system where the defendants in the *Blair* case failed. Thus, regardless of the denial of access to the jury selection records that petitioners requested, it is clear that petitioners could not prevail on the merits of their claim. For that reason, the court of appeals' rejection of that claim warrants no further review.

3. As their last point (Pet. 23-29), petitioners invite this Court to decide the question whether the court of appeals, in the absence of a specifically promulgated local rule, had the authority to hear this case en banc without a request to do so from one of the parties. Petitioners acknowledge (Pet. 24-25), as they must, that the courts of appeals have the power to initiate en banc hearings sua sponte. See

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[3] Petitioners' assertion that persons between the ages of 18 and 34 are likewise underrepresented is immaterial, since "young persons" are not a " 'distinctive' group in the community" within the meaning of *Duren* v. *Missouri*, 439 U.S. 357, 364 (1979). See *Barber* v. *Ponte*, 772 F.2d 982, 1000 (1st Cir. 1985) (en banc), cert. denied, 475 U.S. 1050 (1986).

Western Pacific R.R. Corp. v. *Western Pacific R.R.*, 345 U.S. 247 (1953). Rule 35(a) (Fed. R. App. P.) states that an appeal may be heard by a court of appeals en banc whenever "[a] majority of the circuit judges who are in regular active service" order that an en banc court be convened. And as the advisory committee notes make clear, the rule "does not affect the power of a court of appeals to initiate in banc hearings *sua sponte*."[4]

Petitioners suggest, however, that Rule 35 should be read to contain an implicit limitation, nowhere stated in the text, requiring that courts of appeals promulgate a local rule before they may convene an en banc court sua sponte. There is no warrant for reading any such limitation into the text. Cf. *Huddleston* v. *United States*, No. 87-6 (May 2, 1988), slip op. 6-7; *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), slip op. 6. The statutory authority for Rule 35 is found in 28 U.S.C. 46(c). Interpreting that provision in the *Western Pacific* case, this Court explained (345 U.S. at 259) that Section 46(c) permits "the court itself" to decide the manner in which the en banc power shall be exercised and that "the power may be called into play by any proce-

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[4] Petitioners rely on the advisory committee notes to support the proposition that the Rules of Appellate Procedure "do not provide for the initiation of *en banc* hearing *sua sponte*" (Pet. 9). But in so doing, they misquote the Committee's notes. In petitioners' version (*id.* at 25 n.9 (emphasis added)), the notes are quoted as stating that Rule 35 "does not *effect* the power of a court of appeals to initiate *en banc* hearings *sua sponte*." In the actual text, however, the notes use the word "affect," not "effect." The difference in meaning is significant. Rule 35 was designed to formalize a litigant's right to request en banc rehearing, a right that this Court in *Western Pacific* endorsed as a matter of sound practice but held not to be a matter of statutory right. See 345 U.S. at 261-262. The advisory committee made clear that Rule 35, while affording litigants the power to request en banc rehearing, did not "affect" the traditional discretion of the courts of appeals to convene en banc courts sua sponte.

dure convenient to the court" (*id.* at 259 n.19). The Court emphasized, in particular, that a court of appeals need not assemble in order to convene an en banc proceeding but might use instead a "more informal procedure," including, for example, an order issued by the Chief Judge (*ibid.*).

Petitioners also complain (Pet. 27-29) that the decision to proceed en banc in this case violated "the spirit of *en banc* review," because under Rule 35(a)(2) review by an en banc court must be reserved for questions "of exceptional importance." We do not understand petitioners to contend, however, that the questions they raised on appeal, and now present to this Court, were unworthy of en banc consideration. Under Supreme Court Rule 17, the writ of certiorari is likewise restricted to "special and important" questions, and petitioners repeatedly insist that the questions presented in their petition meet that standard (see Pet. 14, 16, 17, 22). The court of appeals apparently agreed since it regarded the implications of petitioners' challenge to the jury selection procedure in this case as posing a "disturbing, almost devastating, effect * * * on the orderly and efficient conduct of criminal trials" (Pet. App. A55).[5]

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[5] Petitioners suggest (Pet. 25-26) that Judge Friendly, in *United States* v. *New York, N. H. & H. R.R.*, 276 F.2d 525, 553 n.1 (2d Cir.) (opinion on application for hearing in banc), cert. denied, 362 U.S. 961 (1960), "expressed strong doubts as to whether the Circuit had" the power to proceed en banc, sua sponte, without a local rule so providing. In fact, in the cited passage Judge Friendly was voicing a very different concern: he was expressing his doubt whether, in the absence of a request by a party, an en banc proceeding may be ordered "at the request of a judge not participating in the decision" (276 F.2d at 553 n.1). And while Chief Judge Lay, in *United States* v. *Samuels*, 808 F.2d 1298, 1299 (8th Cir. 1987), "question[ed] the propriety" of a sua sponte decision to proceed en banc, no other judge on the court of appeals joined him in the expression of that view.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JUNE 1988

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